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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2003

BERMAN J. WATTS.,

Petitioner,
vs.

LOUIS CALDERA, Secretary of the Army; DEPARTMENT OF THE ARMY, Headquarters United States army Aviation Center and Ft. Rucker,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Berman J. Watts, Jr.
P.O. Box 82202
Atlanta, Georgia
30354
(404) 622-3195

Petitioner Pro Se

85 pp

QUESTIONS PRESENTED

I. Whether employment discrimination involving age includes disparate impact and, proof of disparate treatment as in Title VII race and other employment discrimination?

II. Whether demonstration of a prima facie case of hiring employment discrimination by the McDonnell Douglass framework for discrimination may be limited to the form for post hiring disparate treatment when the hiring framework otherwise demonstrates such discrimination but the post hiring form can be construed not to.

LIST OF PARTIES

Secretary of the Army

Ronald E. Adams (Former CG Ft. Rucker)

Ronnie Blumenthal (EEOC Office of Federal Operations)

Charles R. Butler (Southern U.S. District Alabama Judge)

Willam E. Cassady (Southern U. S. District Alabama Magistrate Judge)

Margaret Cunningham (MSPB Administrative Judge)

Ira De Ment (District Court Judge Middle District Alabama)

LTC Dickinson (Former DCD Security Officer)

Ralph Fico

Firestone Inc. (A Bridgestone Subsidiary)

Ford Motor Co.

Ronnie V. Garren

Alan Godsave (Reg. Dir. DOD OIC Internal Army Investigations)

GTE Corp. (Subsidiary of VERIZON)

James W. Harris (EEO Officer Ft. Rucker)

Blaine King (Former Ft. Rucker Labor Counsel)

C. H. Jacobus (Former Ft. Rucker LHX TOA Div. Dir.)

Lola Louisville (DOD OIC Internal Army Investigator)

Perry N. Martin (EEOC Administrative Judge. B'HAM))

Richard McCabe

Vanzetta P. McPherson (Magistrate Judge M.D. AL)

Ellis D. Parker (Former CG, Ft. Rucked and subsequently Dir.Army Staff during a past Administration)

Ronald F. Pfeiffer (Former COEA CHF. LHX)

George Slagley

David M. Smith (Former Ft. Rucked Labor Counsel)

Ron Steele

Roslyn E. Taylor (Civilian Personnel Director, Ft. Rucker)

Decision Making/Investigative Agencies Involved.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner Berman J. Watts, Jr. respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the Eleventh Circuit entered in the above entitled proceeding on November 12, 2002.

OPINIONS BELOW

The Eleventh Circuit's opinion has not been reported. A copy of that opinion is set forth in the appendix hereto beginning at page AP-1.

JURISDICTION

Action was brought in the district court pursuant to Title VII of the Act of Congress known as " The Civil Rights Act of 1964" as amended, for employment discrimination and retaliation. Judicial review of the involved Merit Systems Protection Board procedures was requested pursuant to Title 5 U.S.C. § 7702,7703. Additional bases of action include 29 U.S.C. § 626(c),633a(c) and 29 U.S.C. § 216(b).

Jurisdiction was specifically conferred on the district

court by Title 42, U.S.C. § 2000e(5),(16)(c); Title 5 § 7703;Title 29 U.S.C. §§ 626,633a; and Title 29 U.S.C. § 216(b). Equitable and other relief was sought under 42 U.S.C. §§ 2000e(5)(g) and 2000e (16). Jurisdiction was also based on 28 U.S.C. §§ 1331, 1343 and 42 U.S.C. § 1981 et seq. and 29 U.S.C. §§ 626(c)(1) and 626(e).

Jurisdiction of the Eleventh Circuit Court of Appeals was conferred by 28 U.S.C. § 1291.

A final order, adopting the report and recommendation of the Magistrate Judge, granting the Secretary's motion for summary judgment, ordering all other motions pending by plaintiff denied as moot and, dismissing plaintiff's claims against the Secretary with prejudice.; was entered on December 6, 2001. Watts filed motion for , Judgment as a matter of law, to amend findings, to Alter or Amend the judgment and Order; for Relief from judgment and order and, objection on December 19, 2001. An Order overruling such objection and denying such post judgment motions was entered on

January 04, 2002. Watts filed Notice of appeal on February 25, 2002.

On appeal, invoking Title 28 §§1291,1292 jurisdiction, the Eleventh Circuit issued an order dismissing the appeal on November 12 , 2003. Timely Petition for Rehearing and Suggestion for Rehearing en Banc were filed and, subsequently denied on February 18, 2003.

The jurisdiction of this court to review the lower court is invoked under 28 U.S.C. §1254 (1).

STATUTES INVOLVED

Supreme Court Rule 10 (a) provides that a Writ of Certiorari may be granted:

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter....or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

29 U.S.C. § 623(f)(1) provides that:

(f) It shall not be unlawful for an employer, employment

agency, or labor organization-

(1) to take any action otherwise prohibited under subsections (a),(b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

to take any action otherwise prohibited under subsection (a), (b),(c), or (e) of this section-

42 U.S.C. § 2000e-16 provides:

Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office,

and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

.....

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government

STATEMENT OF THE CASE

Summary

This case results from the Eleventh Circuit Court of Appeals affirmation of a district court adoption of a Magistrates Report and Recommendation for a summary judgment order in an employment discrimination case based on race, retaliation and age. Although other aerospace engineer jobs advertised nationally as not requiring "helicopter pilot in command" experience were listed, Defendant Respondent Army (Ft. Rucker Army Aviation Center/ Test Organizations and Directorate of Combat Developments), provided announcement and application for, and claimed only a job requiring "helicopter pilot in command" experience existed upon request. Subsequent inquiry via Petitioner's Congressional Representative resulted in the Army's reiteration of such claim in writing although concurrently other such positions were being advertised

in media not yet then cited and, subsequently roughly a dozen such positions were filled not requiring such "helicopter pilot in command" experience. "Official" listings were after the fact assertion(s) involving the single helicopter pilot experience requirement aerospace engineer's job by the personnel officer and his successor (who was not present at such time) rather than the documentation required by Respondent's own regulations for the register of jobs at such period- despite repeated discovery requests and motion to compel discovery prior to summary judgment.

Action was brought in the initial district court pursuant to Title VII of the Act of Congress known as " The Civil Rights Act of 1964" as amended, for employment discrimination and retaliation. Judicial review of the involved Merit Systems Protection Board procedures was requested pursuant to Title 5 U.S.C. § 7702,7703. Additional

bases of action include 29 U.S.C. § 626(c),633a(c) and 29 U.S.C. § 216(b).

REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE ISSUED

SUMMARY

I.The petition should be granted because the Appeals Court finds that " Watts' disparate impact claim is cognizable only under Title VII citing *Adams v. Florida Power Corp.*,255 F.3d 1322, 1326 (11th Cir. 2001) (disparate impact claims not cognizable under Age Discrimination in Employment Act). AP1, n3. Such claim remains in conflict with other circuits.

II. The petition should be granted because the Eleventh Circuit effectively limited proof of employment discrimination in hiring to a McDonell Douglass element for proof of discrimination *after hiring* rather than the properly applied element(s) for hiring discrimination as established in the McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 sect. 1817, 36 L.Ed.2d 668 (1973) demonstration of a prima facie case in an

employment discrimination action.

REASONS FOR GRANTING THE PETITION

I. ADEA Disparate Impact Conflict

The first of two elements of the Eleventh circuit's reasoning is:"First, courts that question the viability of a disparate impact claim under the ADEA note that the text of the ADEA differs from Title VII in an important respect. Section 623(f)(1) of the ADEA explicitly provides that an employer may "take any action otherwise prohibited ... where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). The First Circuit has reasoned that

> "if the exception contained in section 623(f)(1) is not understood to preclude disparate impact liability, it becomes nothing more than a bromide to the effect that "only age discrimination is age discrimination." Such a circular construction would fly in the teeth of the well-settled canon [of statutory construction]."

Mullin v. Raythenon, 164 F.3d at 702.

Such "support" hangs on the definition of Congress's

intended meaning for the simple word "reasonable". Would the inclusion of such phrase in title VII have been sufficient to preclude this court's decision in Griggs v. Duke Power ? Is not what is reasonable under Title VII also reasonable under the ADEA , regardless of the involved protected groups? Are not these laws' mutual and ultimate purpose the deterrence of different and detrimental treatment based on factors other than the job related and those that are a business necessity? Is that not the true essence of unlawful employment discrimination? Even if the Army's actions were criminal the wording of the statute would be sufficiently unambiguous. *Beecham v. United States,* 511 U.S.368,374 (1994) (In deciding whether a statute "is so ambiguous as to warrant the application of the rule of lenity"Our task is not the hopeless one of ascertaining what the legislators who passed the law would have decided had they reconvened to consider petitioner's particular cases. Rather , it is to determine whether the language the legislators actually enacted has a plain unambiguous meaning").

The other element of the Eleventh's circuit's stand is that: "In addition, the language of § 623(f)(1) is similar to

language found in the Equal Pay Act. Section 206(d)(1) of the Equal Pay Act provides that wage discrimination on the basis of gender is prohibited, unless the wage "differential [is] based on any other factor other than sex." 29 U.S.C. § 206(d)(1)(iv). "The Supreme Court [has] interpreted section 206(d)(1) of the Equal Pay Act to preclude disparate impact claims." *Ellis,* 73 F.3d at 1008 (citing *County of Washington, Ore. v. Gunther,* 452 U.S. 161, 170-71, 101 S.Ct. 2242, 2248-49, 68 L.Ed.2d 751 (1981)); *Mullin,* 164 F.3d at 702 (drawing same comparison)."

But the crucial phrase of such act - wage "differential [is] based on any other factor other than sex." 29 U.S.C. § 206(d)(1)(iv). " differs crucially from that of the ADEA Section 623(f)(1) of the ADEA, which states "take any action otherwise prohibited ... where the differentiation is based on reasonable factors other than age." The terms "reasonable" and "otherwise prohibited" are absent from the Equal Pay Act phrase where "any other factor other than sex" is included and, the single condition of employment of a "*wage differential*" is involved. Thus the intent and cited textural differences of Equal Pay Act is far more distinguishable from Title VII than the ADEA.

The Eleventh Circuit concludes that:

"The text of the ADEA is sufficiently distinguishable from Title VII as to raise doubts about extending the disparate impact theory of liability to ADEA cases.

Turning to the legislative history, the *Mullin* and *Ellis* courts note that the ADEA was enacted after the Secretary of Labor issued a report on age discrimination. *Mullin,* 164 F.3d at 702-03; *Ellis,* 73 F.3d at 1008. The report, entitled *The Older American Worker: Age Discrimination in Employment* (1965), recommended that Congress ban arbitrary discrimination, such as disparate treatment based on stereotypical perceptions of the elderly, but that factors affecting older workers, such as policies with disparate impact, be addressed in alternative ways. *Ellis,* 73 F.3d at 1008. Thus, the history of the ADEA differs from the legislative history of Title VII, which the Supreme Court in *Griggs* relied on to find a cause of action for disparate impact. *See Griggs,* 401 U.S. at 432, 91 S.Ct. at 854 (discussing the history of amendments to the bill and noting that for Title VII, Congress specifically "placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.")."

If a requirement has no manifest and legitimate relationship to the employment in question then a license for unreasonable arbitrariness is granted and an employer may thus force each and every individual so affected into a disparate treatment process that is wasteful , inefficient, and inordinately consumes limited judicial and enforcement

resources. A government that is a construct based on separation of powers and checks and balances can

hardly assume that the unfettered empowered are angels.

The Eleventh Circuit further found that :

"Finally, while the *Hazen* Court left open the question of whether a disparate impact claim can be brought under the ADEA, language in the opinion suggests that it cannot. First, the Court noted that "[d]isparate treatment ... captures the essence of what Congress sought to prohibit in the ADEA." *Hazen,* 507 U.S. at 610, 113 S.Ct. at 1706. In addition, the Court reiterated that, in making employment decisions, the use of factors correlated with age, such as pension status, did not rely on "inaccurate and stigmatizing stereotypes" and was acceptable. *Id.* at 611, 113 S.Ct. At 1706-07.
That position is inconsistent with the viability of a disparate impact theory of liability, which requires no demonstration of intent, but relies instead on the very correlation between the factor used and the age of those employees harmed by the employment decision to prove liability."

Such reasoning neglects the fact that there is a difference

in using factors correlated with age that are beneficial

compared with those that are detrimental. Pension status

may well be a factor where a firm seeks to renege on an

employment contract of promised retirement income that was

originally used to attract, keep and motivate it 's employees.

Some employers might well see such pensions status (or

increasing medical insurance costs)as a "stigmatizing stereotype" in terms of the short term apparent (albeit unsustainable) "profits" that can be generated by eliminating either such employees or such "benefits" based on age. Indeed a sufficiently shortsighted firm might well assume that the proven employee loyalty thus gained by promising such pension and health/medical benefits status may be sacrificed for short term gain. But then the experience nominally correlated with age may well be an enhancing stereotype. "Inaccurate and stigmatizing stereotype" is the common propaganda employed as justification in disadvantaging others on the basis of irrelevant differences uncorrelated with job qualification, performance and, ultimately long term business performance.

This nation's sustained post WWII era of economic prosperity accepted the idea of a balance of trust and loyalty between management and labor- or employer and employee, that is now being generally eroded. Pension and medical

benefits along with fair employment practices and virtually lifetime employment cemented such pact. But "productivity" gains based on seeking labor with ever lower living standards rather than technological advances destroys such employer-employee or labor-management relationship. The employee becomes more an expendable commodity rather than a member of an organization with common goals with mutually respected rights and obligations. But sufficient power can permit the violation of any pact and a workforce lacking the loyalty of management is unlikely to return it. The reduction in such mutual (management- labor) support has followed the forced integration of the workplace. Indeed mutual respect only between those one truly sees as human- other white males – might well account for the reduced respect for workers evident as minorities, women and finally cheaper foreign labor both imported and external enter or are recruited to the workplace in increasing numbers. Implied obligations and respect developed when lucrative

employment was primarily white and male are hardly to be extended for anyone now - including now aged white males.

It is the intent that matters and an indicator of intent in disparate treatment can be disparate impact. Where one's purpose is illegal or illegitimate discrimination some degree of camouflage is generally employed. For example ' The "Separate but Equal" doctrine ,that was anything but equal, "masked" the massive growth of ingrained discrimination based on race. Where the policy resulting in such adverse disparate impact is not related to the job the employees are to perform and is not necessary to the employer"s business a disparate impact claim is enabled under Title VII. Such conditions relate to the only plausible cause for the inclusion of the term "reasonable" in the cited Section 623(f)(1) of the ADEA , which states "take any action otherwise prohibited ... where the differentiation is based on reasonable factors other than age." Such reasonable

factors, given the context and such plain language of the statute , can not include those with a discriminatory impact of otherwise fair in form practices and factors. Indeed such analysis provides the parameters for such reasonableness: the relationship of the policy to the job and business necessity. If Congress had intended that disparate impact discrimination be excluded under the ADEA if could have expressly made it clear in the plain language of the statute.

As Eleventh Circuit Court visiting judge BARKETT, Circuit Judge, specially concurring (dissenting in as far as disparate impact being prohibited under the ADEA) put it :

"Disparate impact claims provide an avenue for members of protected classes to prove that discrimination occurred in the workplace when proof of motive is difficult or unavailable. Beginning with *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), the Supreme Court recognized that although discriminatory intent could be hidden, even from the decision maker himself, its effects in the workplace could not. Thus, Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* at 431, 91 S.Ct. 849. Accordingly, the Supreme Court interpreted Title VII to permit a member of a protected group to challenge facially neutral employment practices that perpetuate inequality by disproportionately burdening a protected class."

***Adams v. Florida Power Corp.*,255 F.3d 1322,1326 (11th Cir. 2001)**

Moreover, the subject case here includes the multiple bases of race and retaliation that are inclusive of Title VII and evolve into Age discrimination where a sufficiently motivated employer maintains efforts at blacklisting and actions prohibitive of subsequent employment. Indeed, by such means, participation in such "protective activities" by others is discouraged, the depth of commitment to such "prohibited practices" demonstrated and, such employer's real intent made more evident.

II. Prejudicing the Demonstration of a Prima Facie Case via inappropriate modification of the McDonnell Douglas Corp. v. Green Test.

A prima facie case may be demonstrated by: (1) direct evidence of discriminatory intent; (2) statistical proof of disparate treatment; or (3) meeting a test such as that set out in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 sect. 1817, 36 L.Ed.2d 668 (1973). See *Carter v. City of Miami,*

870 F.2d 578, 581 (11th Cir.1989). Plaintiff's burden in proving a prima facie case is light. See *Brown v. American Honda Motor Co.*, 939 F.2d 946, 949 (11th Cir.1991). In McDonnell Douglas, the Supreme Court articulated the four elements a plaintiff must show in order to establish a prima facie case of employment discrimination:(i) that he belongs to a [protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *McDonnell Douglas,* 411 U.S. at 802, 93 sect. at 1824. The Supreme Court intended this framework to be flexible, see id. at 802 n. 13, 93 sect. at 1824 n. 13, rather than "mechanized, or ritualistic," United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715, 103 sect. 1478, 1482, 75 L.Ed.2d 403 (quoting Furnco Const. Corp. v. Waters, 438 U.S. 567, 577, 98 sect. 2943, 2949,

57 L.Ed.2d 957 (1978)). The Eleventh Circuit has enunciated various reformulations of the McDonnell Douglas test. For example, in Early v. Champion International Corp., 907 F.2d 1077 (11th Cir.1990), it set forth a slightly different variation of the McDonnell Douglas test in an ADEA case involving a "reduction in force." The plaintiff had to show(1) that he was in a protected group and was adversely affected by an employment decision; (2) that he was qualified for his current position or to assume another position at such time; and (3) evidence by which a fact finder might reasonably conclude that the employer intended to discriminate on the basis of age, [race or retaliation] in reaching the decision at issue. *Early*, 907 F.2d at 1082. The Eleventh Circuit has noted in *Pace v. Southern Railway System,* 701 F.2d 1383 (11th Cir.1983), that employment discrimination cases are not easily categorized and why any prima facie case test must be flexible.

Here the Eleventh Circuit relied upon Watts not showing a

person outside the protected class was provided the correct application as reason to deny a prima facie case under an inappropriate adaptation of the McDonnel Douglass model. Such insertion of an inappropriate element of such test was first done by the EEOC Birmingham Office Administrative Law judge in a summary disposition of the administrative complaint precluding any administrative discovery and hearing. EEOC #130-99-8007-X, Agency # ATL-98-AR-0186-E by Perry N. Martin Administrative Law Judge. Subsequently, despite motion and request no discovery was allowed in either district court prior to summary judgment.

The Eleventh Circuit's cases have repeatedly stressed that an overly strict formulation of the elements of a prima facie case is to be avoided. See, e.g. *Carter v. City of Miami, 870* F.2d 578,583 (11th Cir. 1989) (age discrimination plaintiff's inability to show that she was replaced by someone outside of the protected class not an absolute bar to the establishment of a prima facie case).

"Under the traditional *McDonnell Douglas* test, the "inference of discrimination " is not dependent upon an examination of who, if anyone was promoted" (or in this case provided a proper application) "instead of the plaintiff. " Ordinarily, the fourth element of *McDonnell Douglas* is met whenever the employer continues to consider other applicants whose qualifications are comparable to the plaintiff's after refusing to consider or rejecting the plaintiff. *Diazo v. American Telephone and Telegraph* 752 F.2d 1356,1359 (1985).

"The McDonnell Douglas framework "set[s] forth the basic allocation of burdens and order of presentation of proof" applicable in an employment discrimination case. *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 252 (1981) (emphasis added). As such, the prima facie case provides "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577 (1978) (emphasis

added)"

Courts of appeals generally have held, in a variety of litigation contexts, that a complaint need not articulate facts supporting each and every element of the claim for relief. See, e.g., *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 683 (11th Cir. 2001) ("[T]he liberal 'notice pleading' standards embodied in Federal Rule of Civil Procedure 8(a)(2) do not require that a plaintiff specifically plead every element of a cause of action.") (suit against abortion providers under Freedom of Access to Clinic Entrances Act); *Krieger v. Fadely*, 211 F.3d 134, 136 (D.C. Cir. 2000) ("complaints need 'not plead law or match facts to every element of a legal theory'") (Privacy Act suit). With respect to employment discrimination claims in particular, most courts of appeals to address the issue likewise have held that a complaint need not allege facts sufficient to establish a prima facie case of discrimination. *Sparrow*, 216 F.3d at 1115; *Powell v. Ridge*, 189 F.3d 387,

394 (3d Cir.), cert. denied, 528 U.S. 1046 (1999); *Ortez v. Washington County,* 88 F.3d 804, 808 (9th Cir. 1996); R*ing First Interstate Mortgage, Inc.,* 984 F.2d 924, 926-927 (8th Cir. 1993); accord *Bennett,* 153 F.3d at 518 ("'I was turned down for a job because of my race' is all a complaint has to say."); but see *Jackson v. City of Columbus,* 194 F.3d 737, 751 (6th Cir. 1999).

The court of appeals' emphasis on the McDonnell Douglas factors is particularly problematic because those factors do not constitute the elements of a discrimination claim in any strict sense, nor are they the exclusive means by which a plaintiff may establish a prima facie claim of discrimination. As this Court has cautioned, the McDonnell Douglas framework "is not necessarily applicable in every respect in differing factual situations." *McDonnell Douglas,* 411 U.S. at 802 n.13. In fact, the McDonnell Douglas prima facie case does not apply to disparate impact claims, and a plaintiff with direct, rather than circumstantial evidence of disparate treatment, may establish his prima facie case

with a different showing.

Instead, the inquiry into the existence of a prima facie case in all cases reduces to whether the plaintiff has produced "evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion" *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996) (emphasis and brackets omitted). That standard is appropriate for evaluating a record at the summary judgment or trial stage, when discovery has developed and clarified the parties' claims. But it would be precipitate to undertake such an inquiry before discovery commences. The parties' arguments and the court's analysis would have to anticipate what facts and evidence the discovery process might unearth. As a result, motions to dismiss based on the plaintiff's alleged inability to demonstrate a prima facie case could frequently prove to be little more than dress rehearsals for the true battle to come at the summary judgment stage, further postponing the "just,

speedy, and inexpensive determination" (Fed. R. Civ. P. 1) of cases on their merits.

The court of appeals' rule also would erects a "daunting hurdle" for plaintiffs by requiring them to amass evidence of a prima facie case before discovery. *Powell*, 189 F.3d at 396. Facts pertaining to an employee's past performance or an employer's actions subsequent to the adverse employment action, for example, often will be in the hands of the employer. In particular, evidence relevant to the fourth McDonnell Douglas factor-that, after the adverse employment action, the employer continued to seek applicants sharing the plaintiff's general qualifications -will uniquely be in the defendant's possession.

Statistical information relevant to establishing a prima facie case of disparate impact also will often be largely within the employer's ken. See ibid. (noting difficulties that would arise if plaintiffs were required "at the pleading stage, before answers have been filed and before discovery, to

identify" the specific part of defendant's "complex funding formula" that created the adverse effect); *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 250 (9th Cir. 1997) ("without any responsive pleadings or record evidence," plaintiffs did not have facts they needed to allege all the elements of a prima facie case). Employment discrimination plaintiffs, no less than other plaintiffs proceeding in federal court, "are entitled to discovery before being put to their proof." *Bennett,* 153 F.3d at 519.11"

But for such reliance on improper prima facie case element and the nonetheless included articulations of allegedly legitimate reasons for such different treatment proof of illegal employment discrimination is demonstrated.

The clerk who mailed the non-pilot application was cited by the Eleventh Circuit as a "decision- maker " unaware of the adverse acts or protected expressions. Such court cited *Raney v. Vinson Guard Service, Inc.*120 F.3d 1192,1196 as

it's basis for such holding:

"In order to satisfy the "casual link" prong of a retaliation case , a plaintiff must, at a minimum, generally establish that the defendant was actually aware of the protected expression at the time the defendant took the adverse personnel action."

Goldsmith v. City of Atmore 996,F.2d 1155, 1163 (11th cir.

1993).However *Raney* qualifies such holding: "Since corporate defendants act only through authorized agents, in a case involving a corporate defendant the plaintiff must show that the corporate agent who took the adverse action was aware of the protected expression and acted within the scope of his or her agency when taking the action. *See Goldsmith, 996 F.2d at 1162* (general agency principles govern the circumstances in which a principal will be held liable for the acts of it's agents under Title VII)".

The action continuing to deny such application and notice of successive positions filled by others were by management and Command made aware of the involved requests and admittedly aware of Watts's prior protected activities.

Respondent's assertion of provision of notice of new positions only upon specific request was self contradicted in it's own responses as Petitioner pointed out in the record. Thus had the prima facie case been established the insurance articulations excusing such different treatment are also

without merit.

The policy resulting in the disparate impact was identified as that cited by respondent as justifying it's disparate treatment of Watts . In particular; the claim that no notice of such positions was made unless specifically requested; the overall operation of the civilian employment recruitment office at Ft. Rucker (Subsequently moved to Ft. Benning and now Redstone Arsenal);provision of improper applications or announcements in contradiction with published notices as this case exemplifies and; continuation of such claims despite repeated requests.

Additional background evidence as to a prior consent decree's (*Matthews-Hunttington, Southern District Of Alabama Federal Court*) start and ending coinciding with peaks in increased accidental death rate disparities by race for Coffee county (the main bedroom community for Ft. Rucker) were also submitted in the district courts.

CONCLUSION

For the foregoing reasons, petition for certiorari should be granted. The decision by the involved panel should be reversed. The actual issues raised on appeal should be given full hearing and the underlying decision reversed so that the requested relief is granted.

Respectfully submitted,

_____

Petitioner,
(Plaintiff)
P.O. Box 82202
Atlanta, GA 30354
404-622-3195

APPENDIX

APPENDIX

Court Decisions, Orders and Directives

1. Appeals Court Decision

2.Denial of Petition for Rehearing

3.District Court Order adopting Recommendation

4. Recommendations of the Magistrate Judge

5.Denial of Motion to Compel Discovery

6.Court response to Discovery Filing attempt(s).

7.Denial of Amendment/Supplement of Complaint.

8.Denial of Amendment of complaint

9.Final denial of Appointment of Counsel

10.Congressional Correspondence

11. Additional Order denying Amendment of Complaint

Date stamped NOV 12, 2002

IN THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-11104
Non-Argument Calendar

D.C. Docket No. 00-O1260-CV-D-S

BERMAN J. WATTS, JR.

Plaintiff-Appellant

versus
LOUIS CALDERA
(and his predecessor TOGO D. WEST),
Secretary of the Army,
DEPARTMENT OF THE ARMY
Headquarters United States Army Aviation
Center, Ft. Rucker, AL.,

Defendants-Appellees.

Appeal from the United States District
Court for the Middle District of Alabama

(November 12, 2002)

AP1

(EX-1)

Before EMONDSON, Chief Judge, BARKETT and WILSON, Circuit Judges

PER CURIAM:

Plaintiff- Appellant Berman J. Watts Jr.., an African -American male over the age of 40, appeals *pro se* the grant of summary in favor of Louis Caldera, the Secretary of the Army, dismissing Watts' claims of discrimination based on race and age, and of retaliation. No reversible error has been shown; We affirm.

Watts alleged race and age discrimination and retaliation when he sought to apply for work as an aerospace engineer position but only was provided an application that required a pilot's license (which Watts does not have). While Defendant maintains that no non-pilot position existed at the time of Watts' request-- and the official listing of positions discloses no non-

pilot aerospace engineer position , Watts maintains that private publications listed such a position [1] Watts contends that Defendant failed to provide him with the application he requested because of his race, his age, and his prior protected activity. Watts argues further that Defendant continued to discriminate against him by not sending him applications for positions that became available after his initial request.

Watts first raised his race discrimination and retaliation claims with the Fort Rucker Equal Employment Opportunity Office. On 16 April 1999, a final agency decision issued finding that that Watts had presented no evidence of retaliation or discrimination. Watts appealed this decision to the Equal Employment Opportunity Commission Office of Federal Operations (EEOC OFO") and the Merit Systems Protection Board ("MSPB"). The EEOC OFO issued a written decision concluding no

AP3

1Defendant does not dispute that Watts engaged previously in activity protected under Title VII: Watts has filed no fewer than six cases under Title VIIagainst the Secretary of the Army.

retaliation and no discrimination had been shown;the MSPB dismissed for lack of jurisdiction.

The magistrate judge issued a report and recommendation (that the district court adopted and affirmed) that concluded that Watts failed to establish a prima facie case of discrimination or retaliation. About the former Watts raised no genuine issue of material fact that another equally or less qualified person outside the protected class received a non-pilot application when Watts made his request. Indeed, Watts proffered no evidence that someone else was provided a non-pilot aerospace engineer application when Watts was denied one . About Defendant's failure to send Watts applications for non-pilot positions that later became available, Watts never requested applications for these positions ; Watts proffered no evidence that a similarly situated person outside the protected class received an application without asking for one.[2] AP4

2Watts' contention to the effect that he constructively requested applications for positions that became available after his initial inquiry by virtue of inquiries made through his congressman and the administrative claims he filed or both, creates no material issue of fact

About the retaliation claim, we doubt that watts showed an adverse employment act.: no non-pilot position was available when Watts sought an application, and Watts failed to apply for positions when non-pilot positions became available. But , even assuming an adverse employment act , Watts failed to raise a genuine issue of material fact on the casual connection between his protected activities and the claimed adverse employment act. Watts proffered no evidence that the Fort Rucker Employee who sent him the pilot application was aware of his protected conduct. *See generally, Goldsmith v. City of Atmore,* 996 F.2d 1155, 1163 (11th Cir. 1993)(To show protected activity and and adverse employment act are not wholly unrelated, must show decision-maker was aware of protected activity at time of adverse employment act); *Bass v. Board of County Com'rs, Orange County , Fla.,*256 F.3d 1095, 119(11th Cir2001) (" It is not enough for the plaintiff to show that someone in the

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in light of unrefuted evidence of Defendant;s policy to send applications only upon specific request.

organization knew of the protected expression: instead, the plaintiff must show that the person taking the adverse action was aware of the protected expression.) And, because Defendant's policy was to send applications only on a specific request, no casual connection was shown between Watts protected activity and the failure to send an application when no specific request was made.[3]

Watts makes additional arguments that the district court erred (i) when it granted the Army's motion to transfer the case from the Southern District of Alabama to the Middle District of Alabama and again, when it denied his retransfer motions;(ii) when it denied Watts's motion to compel discovery; (iii) When it denied Watts's motion to amend his complaint ; and (iv) when it denied Watts's motion for

3Watts also seeks to assert a disparate impact claim. Watts' disparate impact claim is cognizable only under Title VII. *See Adams v. Florida Power Corp.*, 255 F.3d 1322, 1326 (11th Cir. 2001(disparate impact claims not cognizable under the Age Discrimination in Employment Act). The disparate impact claim fails because Watts identifies no specific practice that resulted in no African-Americans being hired as aerospace engineers.

appointment of counsel. We review each of these claims for abuse of discretion; no abuse of discretion has been shown.

Watts's also assigns error to the district court's dismissal of his appeal of the MSPB decision. The district court concluded that it had no jurisdiction to review the MSPB's decision that the MSPB had no jurisdiction over Watts's appeal.

Appeal of a decision of the MSPB generally falls within the exclusive jurisdiction of the Federal Circuit.*See* 5 U.S.C.§7703(b)(1). Where however , the MSPB decision considers claims of discrimination and an adverse action outlined in 5 § U.S.C. 7512, appeal to the applicable district court may be allowed .*See* 5 U.S.C. § 7703(b)(2). In a case such as this one , however, where the MSPB determined it had no jurisdiction and refused to consider the discrimination claim on the merits , appeal may be had only to the Federal Circuit. *See Wall v. United States* , 871 F.2d 1549 , 1541-44(10th Cir. 1989). Because the MSPB decision Watts sought to appeal never reached the merits of his discrimination

claim, dismissal on jurisdictional grounds was proper.

Watts argues that , at the very least, the district court should have transferred his MSPB appeal to the Federal District.[4] Authority to transfer , contained in 28 U.S.C. § 1631, should be exercised when to do so is in the "interest of justice." Because Watts raised no substantive claim before the MSPB that was not raised before the district court, and because the district court concluded that those claims had no merit, the interests of justice would not be served by a transfer to the Federal Circuit.

We have reviewed all issues advanced by Watts; no reversible error has been shown.

AFFIRMED.

4The MSPB decision dismissing Watts's administrative claim advised Watts that appeal could be had in the Federal Circuit.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-11104-JJ

BERMAN J. WATTS, JR.,
Plaintiff-Appellant,

versus

LOUIS CALDERA,
(And his predecessor Togo West),
Secretary of the Army,
DEPARTMENT OF THE ARMY
Headquarters United States Army Aviation
Center, Ft. Rucker, AL.,
Defendants- Appellees

On Appeal from the United States District Court
for the Middle District of Alabama

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion _____,11th Cir., 19__, _____F.2d_____).

Before: EDMOSON, Chief Judge, BARKETT and WILSON, Circuit Judges.

PER CURIAM:

The Petitions for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT
AP9

(EX. 2)

J. L EDMONSON (Signed)
CHIEF JUDGE

ORD-42
(12-01)

(Date stamped on Court seal : Filed U.S> Court of Appeals
Eleventh Circuit FEB 18 2003 Thomas H. Khan Clerk)

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

BERMAN J. WATTS, JR.,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO.
	)	00-D-1260-S
LOUIS CALDERA, ET AL.,	)	
Defendants.	)	

ORDER

This cause is now presented to the court on the Recommendation of the Magistrate Judge, filed October 31, 2001, and plaintiff's objections, filed November 9, 2001.

It is CONSIDERED and Ordered as follows:

1. That plaintiff's objections be and the same are hereby OVERRULED;
2. That the Recommendation of the Magistrate Judge be and the same is hereby ADOPTED, APPROVED and AFFIRMED;
3. That the motion for summary judgment (Doc. #49) filed by the defendants be and the same is hereby GRANTED;
4. That all other pending motions be and the same are hereby DENIED as moot; and
5. That all of the plaintiff's claims against the defendants be and the same hereby DISMISSED WITH PREJUDICE.

DONE this 6th day December, 2001.

(Signed) IRA DeMent
UNITED STATES DISTRICT JUDGE

EOD 12/6/01

(Date Stamped: FILED DEC 6 2001 Clerk U.S. DISTRICT COURT MIDDLE DISTRICT OF ALABAMA.)

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

BERMAN J. WATTS, JR., Plaintiff,	)	
vs.	)	CIVIL ACTION NO.
	)	00-D-1260-S
LOUIS CALDERA, ET AL., Defendants.	)	

RECOMMENDATIONS OF THE MAGISTRATE JUDGE

The plaintiff Berman Watts ["Watts"], initially filed this action on 14 April 2000, in the United States District Court for the Southern District of Alabama alleging numerous claims pursuant to the Civil Rights Act of 1964, *as amended,* 42 U.S.C. §2000e-16 ["Title VII"], against defendants Louis Caldera ["Caldera"] , Secretary of the Army; Caldera's predecessor, Togo West, The Department of the Army; and Headquarters of the United States Army Aviation Center in Fort Rucker , Alabama (Doc.#1, Compl.). On 15 September 2000, the United States District Court for the Southern District of Alabama transferred venue of this action to this court (Doc.#33). Jurisdiction is invoked

pursuant to 28 U.S.C. §§ 1331, 1343.

This case is now before the court on the Defendant's Motion to Dismiss, or in the alternative, For Summary Judgment filed on 16 November 2000 (Doc.# 49). The Magistrate Judge finds it appropriate to consider matters outside the pleadings, specifically certain documents filed as exhibits during the course of this litigation.[1] Therefore , the Magistrate Judge will treat Defendants' mnotion as one for summary judgment pursuant to Fed.R.Civ.P. 56. For the reasons that follow , the Magistrate Judge concludes that there exists no genuine issue of material fact and that the defendants are entitled to judgment as a matter of law. Accordingly, the Magistrate Judge RECOMMENDS that the motion for summary judgment be GRANTED.

I.FACTS AND PROCEDURAL HISTORY[2]

Watts commenced this action ***pro se,*** seeking redress for alleged race discrimination and retaliation[3] in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e through` 2000e-17, as amended by the Civil Rights act of 1991, 42 U.S.C.§ 1981a. According to Watts, in December 1995, the website for "America's JOB Bank" listed two

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[1]Pursuant to Fed R. Civ.P. (12(b), the court construes the motion to dismiss, or in the alternative , for summary judgment" as one for summary judgment. When the movant submits a 12(b)(6) motion and "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56..."Fed.R. Civ.P. 12(b). In ruling on this motion, the court has considered the various exhibits submitted by plaintiff and defendants.

[2]The court presents the facts as alleged by the plaintiff.

[3]Watts, who is African-American, is a prior participant in protected activity (Doc.#1, Compl.,pp.1,4). As the defendants concede, Watts has previously engaged , on numerous occasions, in EEO activity protected under Title VII and has filed at least six cases against the Secretary of the Army (Doc.#51,n.1).

federal job opportunities for an aerospace engineer at Fort Rucker, Alabama; one of these positions did not require helicopter pilot experience (Doc. # 1, Compl., p.3). Watts contacted the Fort Rucker Civilian Personnel Office ["CPO'] and requested that an application for the non-pilot aerospace engineer position be mailed to him(***Id.***). Watts however received an application via mail for the position of Aerospace Engineer (Test Pilot) which required pilot experience (***Id***). Watts further inquired about the non-pilot aerospace engineer position and was informed by tge CPO that position did not exist; but that the test-pilot aerospace engineer position was the only position listed and available in Fort Rucker (***Id.***).

Watts disputes that assertion and submits that "although the non-pilot aerospace engineer] listing was removed from the [website] it continued to be advertised in print publications for months as late as February 1996 and as [sic] announcement obtained from another source in May 1996" (Doc. #1, Compl., p.4). Watts further alleges that

> "Despite a standing agreement that during complaint processing notice of any such jobs would be made to [him], approximately a dozen non-black aerospace and similar engineers were hired in position requiring similar and lesser qualifications, but by an alternative listing means such as Fort Benning's staffing and listing center on behalf of Ft. Rucker"

(Doc. #1, Compl.,p.4). Watts concluded, and his complaint alleged, that by their actions the defendants discriminated against him on the basis of his race.

A. Administrative Procedural History

As a result of the alleged discriminatory actions, Watts initiated the following administrative actions: On 25 March 1996, Watts sent a letter to the Fort Rucker Equal Employment Opportunity ["EEO"] office, contending that he had been subjected to race discrimination when the CPO did not provide him with an application for a non-test pilot aerospace engineer position (Doc #50, exh. 9). On 1 May 1996, Watts met with an EEO counselor for informal pre-complaint processing, contending that he had been subject to retaliation and race discrimination 9Doc #50, exh 10). After informal counseling failed to resolve his complaint. Watts filed a formal EEO complaint on 3 September 1996 (Doc#50, exh.12). On 27 September1996, the Fort Rucker EEO office rendered a final agency decision, dismissing Watts' EEO claim for failure to state a claim

> You alleged that you were discriminated against when you were not provided an application package for a non-pilot, Aerospace Engineer, GS-13, vacancy which was announced in November 1995. Based on a thorough review of record, no such position vacancy ever existed at Fort Rucker.

(Doc. #50, exh 13). Watts appealed the EEO decision and, on 11 December 1997, the Equal Employment Opportunity Commission ["EEOC']'s Office of Federal Operations ["OFO'] reversed the dismissal and remanded the case to Fort Rucker 9 Doc. 3 50, exh 14). Specifically , the EEOC OFO found that

> given the factual discrepancies it would be inappropriate to find in a procedural decision (which involves no investigation no hearing) that no such vacancy(ies) actually existed. Therefore, we can not find that [Watts] was not aggrieved, The Commission makes no finding in this decision, however, that any vacancies

> as referred to by [Watts] actually existed. The Commission simply finds , under the instances that this is a question best answered after and investigation and/or hearing,

(Doc. # 50, exh.14).

In 1998, at the request of the Fort Rucker, the Department of Defense Office of Complaint Investigations ["DOD OCT"} conducted an investigation into watts' claims and found no evidence of retaliation or discrimination (Doc. #50, exh 15). Upon Watts' request an EEOC Administrative Judge reviewed the case and, on 24 February 1999, rendered a written opinion finding no evidence of retaliation or discrimination. That decision was premised on the non-existence of a non-pilot aerospace engineer position (Doc. # 50, exh. 16). On 16 April 1999, the U. S. Army issued a final agency decision, adopting the EEOC Administrative Judge's finding, that Watts had presented no evidence of retaliation or discrimination (Doc. # 50, exh. 17).

Watts appealed this decision to the EEOC OFO and to the Merit Systems Protection Board ["MSPB"]. On 31 March 2000, the EEOC OFO issued a written decision upholding the Army's finding of no retaliation and no discrimination (Doc. #50, exh. 18). On 5 August 1999, an administrative judge of the MSPB issued an initial decision dismissing Watts' appeal for lack of jurisdiction (Doc.#50, exh 19). Watts petitioned the full board of the MSPB for review of the initial decision and on 14 February2000, the board of the MSPB denied Watts' petition for review and adopted the initial decision of the administrative judge as the MSPB's final decision. (Doc. #50, exh 20).

B.Judicial Procedural History

On 14 April 2000, Watts filed this action alleging that he was subjected to race discrimination and retaliation (for prior protected activity) when (1) the CPO at Fort Rucker , Alabama, did not provide him with the proper job application for the vacant non-pilot aerospace engineer position, and (2) the Fort Rucker CPO continued to discriminate against him by not sending him applications for subsequent non-pilot aerospace engineer job openings (Doc #1, Compl., 1-6)[4] Watts requests judicial review of the MSPB procedures and seeks the following relief:

1. A declaratory judgment that the challenged policies and practices violated Title VII.
2. A preliminary and permanent injunction enjoining the defendants from "maintaining or continuing [the] discriminatory and retaliatory employment practices";
3. An award of full back pay and front pay.
4. An award of compensatory damages, and
5. An award of the expenses and costs of this action.

(Doc.# 1, Compl.,pp.6-7.

On 16 November 2000, the defendants filed a Motion to Dismiss, oe in the alternative, For Summary Judgment (Doc.#49), asserting that (a) the only proper defendant in a Title VII case is the Secretary of the Army, thus all other defendants should be dismissed; (2) this court lacks

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[4] The defendants submit that Watts added two additional claims to his complaint during a pretrial conference held on 20 October 2000 (Doc.#51,p.2). The record indicates that no pretrial conference has been held in this case. On 20 October 2000, a scheduling conference was held before the undersigned Magistrate Judge (Doc.# 39), however no additional claims were added to Watts' complaint. The Magistrate Judge concludes that the defendants' assertion was made in error, and declines to address these additional" claims.

jurisdiction over Watts' Title VII claims:[5] (3) this court lacks jurisdiction to review the MSPB's decision;(4) Watts' claims should be dismissed because he did not file timely claims during the administrative process; and (5) Watts fails to prove a prima facie case of discrimination or retaliation (Doc #51). Watts filed his response to the motion on 13 December 2000 (Doc.#54).

II.STANDARD OF REVIEW

Summary judgment can be entered on a claim only if it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law" ***Fed R. Civ.P. 56(c).*** On a motion for summary judgment , the court is to construe the evidence and factual inferences arising therefrom in the light most favorable to the nonmoving party.[6] ***Adickes v. S.H. Kress & Co.,***398 U.S. 144,

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[5] Specifically, the defendants assert that

> Title VII provides a cause of action for "employees" and "applicants for employment." Because [Watts] was neither an employee nor an applicant for employment during the period relevant to this lawsuit, he is not protected by Title VII and the Court lacks jurisdiction over his Title VII claims.

(Doc. #51, p.8). The Magistrate Judge does not address this assertion in length because Watts was clearly an "Applicant for employment" The Magistrate Judge therefore concludes that this assertion is without merit and does not warrant further discussion.

[6] The Supreme Court explained that:

> [The] plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion , against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation , there can be 'No genuine issue as to any material fact." since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317,322-23 (1986)(citations omitted).

158 (1970); ***Mize v. Jefferson City Bd. Of Educ.***, 93 F.3d 739, 742 (11th Cir. 1996).

Consideration of a summary judgment motion does not lessen the burden of the nonmoving party, i.e., the nonmoving party still bears the burden of coming forth with sufficient evidence on each element that must be proved.[7] ***Earley v. Champion Intern. Corp.***, 907 F.2d 1077, 1080 (11th Cir. 1990); ***see Celotex,*** 477 U.S. At 322-23. The nonmoving party need not present evidence in a form necessary for admission at trial;however, he may not merely rest on his pleadings. ***Celotex,*** 477 U.S. At 324.

The Court of Appeals has stated that a ***pro se*** plaintiff should not be held "to strict accountability of compliance with the rules of procedure" and that the palintiff's complaint should be construed more leniently than formal pleadings drafted by attorneys. ***Holifield v. Reno***,115 F.3d 1555, 1561 (11th Cir. 1997) (***citing Hughes v. Rowe,***449 U.S. 5,9 (1980). However, although factual inferences must be viewed in the a

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[7] [I]f on any part of the prima facie case there would be insufficient evidence to require submission of the case to a jury...[the court must] grant summary judgment [for the defendant] ." ***Earley,***907 F.2d at 1080 (citations omitted). In ***Earleyn*** the Court of Appeals further emphasized:

> "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." ***Anderson,***477 U.S. At 252
>
> ***
>
> If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." ***Anderson,*** 477 U.S. At 349-50 ***Casting Corp.***, 849 F.2d 1372,1376 (11th Cir. 1988).

Earley, 907 F.2d at 1080-81.

light most favorable to the non-moving party, and ***pro se*** complaints are entitled to a liberal interpretation by the courts, a ***pro se*** litigant does not escape the essential burden under summary judgment standards establishing that there is a genuine issue as to a material fact in order to avert summary judgment. ***Brown v. Crawford,*** 906 F.2d 667, 670 (11th Cir. 1990). Thus the plaintiff's ***pro se*** status alone does not mandate the court's disregard of elementary principles of production and proof in a civil case.

III.DISCUSSION

A. Liability under Title VIII

The law is clear that the head of a federal agency alleged to have discriminated against a federal employee is the ***only*** proper defendant in a federal sector employment discrimination case. ***See*** 42 U.S.C. §2000e-16(c) (providing that the department head is the sole proper defendant in a Title VII action);***Canino v. United States EEOC,*** 707 F.2d 468, 472 (11th Cir. 1983)(holding that a federal employee could only file suit against the head of the agency).

Pursuant to10 U.S.C. § 3013(a)(1), the Secretary of the Army is the head of the Department of the Army. Accordingly, Caldera, in his official capacity as Secretary of the Army, is the sole proper defendant in this case. The Magistrate Judge therefore finds that Watts may not maintain a Title VII action against the Department of the Army, Headquarters United States Army Aviation Center, Fort Rucker, Alabama, and concludes that it is entitled to dismissal as a named party.

B. Review of MSPB Decision

The Magistrate Judge agrees that this court lacks subject matter jurisdiction to review the MSPB's decision and that

Watts' claim should be dismissed pursuant to *Federal Rule of Civil Procedure 12(b)(1)*[8]; (See Doc.# 51,p.9). In general, 5 U.S.C.§§ 7702 and 7703 govern judicial review of MSPB decisions. Section 7703(b)(1) gives the Federal Circuit jurisdiction over "petition[s]to review a final order or final decision of the Board...." 5 U.S.C. §7703(b)(1)[9]; ***see also*** 28 U.S.C. § 1295(a)(9). There is, however, an exception to Federal Circuit jurisdiction. Section 7703(b)(2) confers jurisdiction upon the district courts for "cases of discrimination subject to the provisions of § 7702 of this title....." 5 U.S.C.§ 7703(b)(2).

Section 7702 lists the categories of cases within the jurisdiction of the district courts.[10] A complaint governed

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[8]Federal Rule of Civil Procedure 12 (b)(1) provides in relevant part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:(1) lack of jurisdiction over the subject matter....

[9]Section 7703(b)(1) provides in relevant part:

> Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law , any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

[10]Section 7702 lists the Categories of cases as:

> .....the case of any employee or applicant for employment who--
> (A) has been affected by an action which the employer or applicant may appeal to the Merit Systems Protection Board, and
> (B) alleges that a basis for the action was discrimination prohibited by --
> (i) section 717 of the Civil Rights Act of 1964

by this section must satisfy two requirements. First , he must have been "affected by an action which the employee or applicant may appeal to the [MSPB]."5 U.S.C. § 7703(a)(1)(A).[11] Second, the employee must allege "that a basis for the action was discrimination prohibited by_(i)

(42 U.S.C. 2000e-16),
(ii)section 6(d) of the Fair Labor Standards Act of 1938 (29 U,S,C, 206(d)),
(iii)section 501 of the rehabilitation act of 1973 (29 U.S.C. 791),
(iv)section s 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or
(v) any rule, regulation , or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph.

[11] The types of adverse actions over witch the MSPB has jurisdiction are listed in 5 U.S.C. § 7512.
Section 7512 provides:

This subchapter applies to--
(1) a removal;
(2) a suspension of more than 14 days;
(3) a reduction in grade;
(4) a reduction in pay; and
(5) a furlough of 30 days or less;

but does not apply to--
(A)a suspension or removal under section 7532 of this title,
(B)a reduction -in-force action under section 3502 of this title,
(C) the reduction in grade or a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,
(D) a reduction in grade or removal under section 4303 of this title, or
(E) an action initiated under section 1215 or 7521 of this title.

section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16)..."5 U.S.C. §7702(a)(1)(B). Cases which satisfy these two requirements are known as "mixed-case appeals."

Although §§ 7702 and 7703(b)(2) grant district courts jurisdiction to review MSPB decisions in mixed-case appeals, the Federal Circuit holds that those provisions do not defeat its jurisdiction under § 7703(b)(1) to review certain decisions in which the MSPB has dismissed claims on procedural or threshold grounds. ***See Smith v. Merit Sys. Prot. Bd.,*** 813 F.2d 1216 (Fed. Cir. 1987) (holding that the Federal Circuit has Jurisdiction to hear appeals from MSPB orders dismissing employees' claims for lack of jurisdiction);***Ballentine v. Merit Sys. Prot. Bd.,***738 F.2d 1244, 1247 (Fed.Cir. 1984)(recognizing an exception to the district courts' jurisdiction for mixed cases in which the MSPB has dismissed, not on the merits, but on jurisdictional or procedural grounds).

In this case, the MSPB dismissed Watts' appeal for lack of jurisdiction (Doc. # 50 exhs. 19,20). Although Watts alleges that this court should review the MSPB decision of his appeal, he has offered no evidence or good reason why the decision, which is based on procedural or threshold matters, should not be reviewable in the Federal Circuit.[12] His position is simply unsupported by law. ***See Wall v. United States,*** 871 F.2d 1540 (10th Cir. 1989) (holding that denial by MSPB of appeal of former Department of Health and Human Services employee's claim of discrimination

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[12] The evidence indicates that Watts was aware that jurisdiction to review the MSPB appeal decision dismissing his claims on jurisdictional grounds lay only with the Court of Appeals for the Federal Circuit. In its 14 February 2000 Final order, the MSPB instructed Watts that he had the right to request the United States Court of Appeals for the Federal Circuit to review the the MSPB final order (Doc.#1, Compl. ;Doc. #50, exh 20). Watts never requested such a review.

could only be reviewed by Federal Circuit Court of Appeals, rather than federal district court, where Board's decisions involved only threshold issue of jurisdiction); ***Sloan v. West,*** 140 F.3d 1255, 1261-62 (9th Cir. 1998) (holding that even when "jurisdictional question is intertwined with the discrimination claim "review of an adverse MSPB decision is proper only in the Federal Circuit).

These decisions compel the conclusion that the jurisdiction to review the adverse MSPB decision in this case lies only with the Court of Appeals for the Federal Circuit. The Magistrate Judge thus concludes that Watts' claim seeking judicial review of the MSPB decision should be denied.

C. Timeliness of Administrative Claims

The defendants assert that Watts' claims[13] should be dismissed because he did not file timely claims during the administrative process (Doc. #51,p.10).The defendants argue that "to timely [sic] initiate informal pre-complaint processing , an aggrieved federal employe must consult with an EEO counselor within 45 days of the alleged discriminatory event" (***Id.*** At 11). The defendants submit that Watts failed to consult with an EEO counselor within the prescribed time, and thus failed to raise a timely allegation of discrimination in the Administrative process (***Id.***). The defendants conclude that "[if]f an employee fails to timely [sic] raise an allegation of discrimination in the administrative process, then he has failed to properly [sic] exhaust his administrative remedies, and the claim should be

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[13] Specifically, the defendants assert that only Watts' first claim should be dismissed on this ground (Doc.#51,p.10). However, since Watts' first and second claims of discrimination refer to the same nucleus of fact, the court has considered the defendants' argument as to both claims.

dismissed" (***Id.***).

Congress has empowered the EEOC with the responsibility to issue rules and regulations implementing the provisions of Title VII 42 U.S.C. §2000e-16(b). Regulations , properly promulgated, have the force and effect of law. ***United States v. Nixon,***418 U.S. 683, 695 (1974). Armed with congressional authority, the EEOC has promulgated regulations which provide that, in asserting a discrimination charge against the federal government, an aggrieved employee must first undergo a counseling period. The EEOC regulation require an aggrieved employee to contact a designated EEO counselor within forty-five days of "the matter alleged to be discriminatory." 29 C.F.R. § 1614.105(a)(1).This requirement is waived, however, if the aggrieved employee can show cause for failing to meet the forty-five day deadline. ***Id.*** At1614.105(a)(2).

These rules are not mere technicalities, but are integral parts of Congress' statutory scheme of achieving a "careful blend of administrative and judicial enforcement powers." ***Thompson v. West,*** 883 F.Supp. 1502,2507 (M.D.Ala 1995). The supreme Court has repeatedly upheld dismissal or summary judgment in cases where a plaintiff has failed to pursue and administrative discrimination complaint in a timely manner. ***Lorrance v. AT&T Technologies, Inc.,*** 490 U.S. 900 (1989);***BAldwin County Welcome Center v. Brown,*** 466 U.S.147(1984) (per curiam);***Deleware State College v. Ricks,***449 U.S.250 (1980);***United Air Lines, Inc.v. Evans,*** 431 U.S. 553 (1977).

Similarly, the law of this circuit provides that a federal employee's unexcused failure to initiate a timely administrative discrimination complaint results in dismissal of the suit for failure to state a claim upon which relief may be granted. ***Manning v. Carlin, 768*** F.2d 1108, 1109 (11th Cir.1986); ***Bickham v. Miller,*** 586 F.2d 736, 737-738 (5th

Cir, 1978);[14] ***Oaxaca v. Roscoe,*** 641 F.2d 386, 391-391(5th Cir. 1981). Therefore , it is clear that a federal employee must exhaust administrative remedies in a timely manner before filing an employment discrimination suit under Title VII. ***Brown v. General Serv. Admin.,***425 U.S. 820, 829-832 (1976).

It is undisputed that failed to make contact with an EEO counselor within forty-five days of the alleged discriminatory acts. Watts. In his complaint , Watts states that he discovered the non-pilot aerospace engineer position and was denied the correct application in December 1995 (Doc.#1, Compl., p1). By 5 December 1995, the evidence establishes that Watts had formed the belief that Fort Fort Rucker had discriminated against him by denying him the correct application. (Doc.#50.exh.8). Despite his belief, Watts did not contact the EEO office until 25 March 1996; over ninety days after the alleged discriminatory acts (Doc.#51, exh.9). Further, Watts has failed to show cause for failing to report the alleged discrimination with forty-five days of the acts.[15] S***ee*** 29 U.S.C. § 1614.105(a)(2). Accordingly, the magistrate Judge agrees with the defendants' contention and finds that Watts failed to make a timely initial contact with an EEO counselor.

However, Watts' failure to initiate EEO contact in a timely manner does not necessarily warrant dismissal of this case. A strong argument can be made that this emphasized

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[14] In ***Bonner v. City of Prichard, Ala.,***661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit issued prior to October 1, 1981.

[15] While the court recognizes that the forty-five day filing period may in some circumstances be subject to waiver, tolling or estoppel, ***see generally Zipes v. Trans World Airlines, Inc.,***455 U.S. 385,393 (1982(, the facts before the court do not warrant the application of the aforementioned equitable principles.

full exhaustion of administrative remedies over ***timely contacts*** with the administrative agency.

> Exhaustion of administrative remedies serves important policies. The requirement that discrimination complaints first be presented to an agency rather than a court encourages informal, conciliation-oriented resolution of disputes and reduces the burden on federal courts...It is also particularly important that the agency develop a record and have the opportunity to exercise its discretion , to apply its expertise, and possibly, to discover and correct its own errors.'

Thompson, 883 F. Supp. At 1507 (citations omitted). In the instant case, notwithstanding a delay of more than 90 days between the allegedly discriminatory acts and Watts' initial contact with the EEO Office, Watts d fully exhausted his administrative remedies, ***see Administrative Procedural History, supra.***

Thus, dismissing Watts' complaint without prejudice to allow further administrative processing would be futile. Because Watts did not fail to exhaust his administrative remedies under Title VII, the court has subject mater jurisdiction to entertain the lawsuit. ***But cf. Thompson v. West,*** 883 F. Supp at 1506 October 29,2001 (Citation Omitted)(If an employee fails to exhaust his or her administrative remedies under Title VII, the court lacks subject matter jurisdiction to entertain the lawsuit). Accordingly , the Magistrate Judge has considered the merits of Watts' Title VII claims.

D. Title VII claims

In an action alleging disparate treatment based on race under Title VII,[16] a [plaintiff must prove an intentional discriminatory motive by presenting either direct or circumstantial evidence of racial animus. ***St. Mary's Honor Center v. Hicks,***509 U.S.. 502(1993); ***see e.g., Lee v. Russell County Bd. Of Educ.,*** 684 F.2d 769, 771-772(11th Cir.1982). Absent direct evidence, as is the case here, a plaintiff can establish intentional discrimination under the burden shifting analysis set forth in ***McDonnell Douglass Corp. v. Green,***411 U.S. 792 (1973) and ***Texas Dep't of Community Affairs v. Burdine,*** 450 U.S. 248 (1981).

Under the ***McDonnell Douglas*** and ***Burdine*** framework,[17] *t*he plaintiff must create an inference of discrimination by establishing a prima facie case. If he does so, the defendant must"articulate some legitimate, nondiscriminatory reason for the employee's rejection.' The plaintiff may then attempt to show that these reasons are pretextual or may present other evidence to show that discriminatory intent was more likely the cause of the employer's actions. ***Nix v. WLCY Radio/Rahall Communications,***738 F.2d 1181, 1184(11th Cir. 1984)(citations omitted).

1.Discrimination in Distribution of Applications

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16 Title VII makes it "an unlawful employment practice for an employer.... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individuals race, color, religion, sex , or national origin" 42. U.S.C. § 2000e-2(a)(1).

17 The Supreme Court of the United States adopted this analysis to implement "[t]he language of Title VII,' which makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.' ***McDonnell Douglas,*** 411 U.S. At 800.

Watts alleges that he is a victim of race discrimination because, after he requested an application for an aerospace engineering position that did not require test pilot experience, the defendants sent him an application for an aerospace engineer position that required test pilot experience (Doc.#1, Compl.,p.3). Watts also alleges that this alleged discrimination occurred on a continuing basis (Doc. #1, Compl., p.5). Accordingly, Watts must satisfy a prima facie case by establishing that:(1) he belongs to a protected class;(2) he was qualified for the position for which he attempted to apply; (3) he was wrongfully denied an application; and (4) another equally or less qualified individual received the correct application. ***See Batey v. Stone,***24 F.3d 1330, 1333(11th Cir. 1994)(citation omitted).

While Watts is clearly within a protected class, the Magistrate Judge finds that he has failed to establish a prima facie case of discrimination. Specifically, Watts has not raised a genuine issue of material fact that :another equally or less qualified individual outside the protected class received the correct application." Watts failed to show that an individual outside the protected class was provided a non-pilot aerospace engineer application or even that ***any*** individual was provided a non-pilot aerospace engineer application. Watts simply has failed to present ***any*** evidence, aside from the conclusory allegations contained in his complaint, that raises an inference that he did not receive a non-pilot aerospace engineer application because of his race.[18]

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[18] Rule56(e) states in part:

When a motion for summary judgment is made and supported as provided in this rule, **an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate shall be entered against the adverse party.**(Emphasis supplied)

Because Watts has failed to demonstrate that he was treated less favorably than other individuals who sought a non-pilot aerospace engineer application, the Magistrate Judge finds that he has not proven a prima facie case of discrimination. Thus, the defendants are entitled to summary judgment on Watt' race discrimination claim.

2. Retaliation

Title VII also protects employees against retaliation for engaging in statutorily protected activities, such as filing a charge with the EEOC. 42 U.S.C. § 2000e-3(a). Proof of retaliation is controlled by the analytical framework set forth in ***McDonnel Douglass*** and ***Burdine*** discussed ***supra.***

Watts asserts that the defendant's failure to provide him with a non-pilot aerospace engineer application was a retaliatory action taken against him for filing numerous previous complaints with the EEOC. TO establish a prima facie case, Watts must show "(1) thath he was engaged in statutorily protected activity;(2) that the employer has taken adverse action; and (3) a causal connection exists between the two." ***Donnellon v. Fruehauf Corp.,*** 794 F.2d 598, 600-601 (11th Cir. 1986) (citations omitted);***Meeks v. Computer Assoc. Intern.,*** 15 F.3d 1013, 1031 (11th Cir. 1994).

Watts has established the first two elements of his prima facie case, because his prior participation in protected activity is not disputed, and none of the parties disputes the fact tht Watts did not receive an application for a a non-pilot aerospace engineer position. However, Watts hast not established the third element of his prima facie case, namely , a causal connection between his prior EEO activity and the

alleged adverse employment action.

To establish the casual connection between protected activity and the adverse employment action, Watts must demonstrate that the filing of a charge a charge with the EEOC "was a 'but for' cause of the adverse employment decision....If the employee does not not bear that burden of persuasion, he or she may not prevail."***McDaniel v. Temple Indep. Sch. Dist.,***770 F.2d 1340, 1346 (5th Cir.1985). In other words , the "casual link" element requires " merely that the plaintiff establish that the protected activity and the adverse action were not wholly unrelated." ***Simmons v. Camden County Bd. Of Educ.,*** 757 F.2d 1187, 1189 (11th Cir. 1985), quoted in ***Hairston v. Gainesville Sun Publ'g Co.,*** 9F.3d 913, 920 (11th Cir. 1993).("[I]n a case involving a corporate defendant the plaintiff must show that the corporate agent who took the adverse action was aware of the plaintiff's protected expression...").

In this case, Watts has failed to show that "the protected activity and the adverse action are not completely unrelated." Watts jas presented no evidence that the Fort Rucker CPO employee who received his request for the non-pilot aerospace engineer application , or the employee who sent him the test-pilot aerospace engineer application, was aware of his protected conduct.[19] Indeed Watts has failed to ***identify*** an employee in either category;therefore , it is impossible to conclude whether the employee(s) were aware of Watts' protected activity. The Magistrate Judge thus concludes that

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19 As evidence in support of their motion for summary judgment, the defendants submitted the affidavit of Roslyn E. Taylor [Taylor], Chief of Labor Management and Employee Relations Divisions(Currently the Civilian Personnel Officer) (Doc. #50, exh. 21). Taylor testified that she was aware that Watts had filed other complaints, but doubt[ed] that any of the other employees, especially the ones he would have to contact for an application package , were aware of that " (Doc. 50, exh.21, 9. 164).

the defendants are entitled to summary judgment on Watts' retaliation claim.

IV.CONCLUSION

Accordingly, it is RECOMMENDATION of the Magistrate Judge that:

1. The motion for Summary judgment (Doc. #49) filed by defendants be GRANTED;
2. All other pending motions be DENIED as moot; and
3. All of the plaintiff's claims against the defendants be DISMISSED WITH PREJUDICE.

DONE this 31st day of October, 2001.

Signed Vanzetta Penn McPherson
VANZETTA PENN MCPHERSON
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

BERMAN J. WATTS, JR., Plaintiff,	)	
vs.	)	CIVIL ACTION NO.
	)	00-D-1260-S
LOUIS CALDERA, ET AL., Defendants.	)	

ORDER

Upon consideration of the plaintiff's Motion for Extension of Time for Response to Defendant's Motion to Dismiss or Alternatively Motion for Summary Judgment, and, Further Motion to Compel Discovery, filed on 27 November 2000(Doc.#53), and for good cause , it is

ORDERED that the motion is DENIED as moot in as much as the plaintiff filed Plaintiff's Response to Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment on 13 December 2000 (Doc.#54).

DONE this 18th day of October, 2001.

Signed Vanzetta Penn Mcpherson
VANZETTA PENN MCPHERSON
UNITED STATES MAGISTRATE
JUDGE

(EX. 5)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
OFFICE OF THE CLERK
POST OFFICE BOX 711
MONTGOMERY , ALABAMA 36101- 0711

DEBRA P. HACKETT, TELEPHONE(334)223-7308
CLERK

October 13, 2000

Berman J. Watts Jr.
2648 Brownsmill Rd.
Atlanta, GA 30354

Re: Berman J. Watts Jr. vs. Louis Caldera, et al.
Civil Action No. 00-D-1260-S

Dear Sir:

The enclosed pleading(s) is returned herewith because it is no longer necessary to file discovery with us pursuant to our Local Rule 5.1, "Non-Filing of Civil Discovery,' a copy of which is attached.

Thank you for your cooperation.

Sincerely,

DEBRA P. HACKETT, CLERK

By D. Yates (Signed)
Deputy Clerk

DPH/dy
Enclosures "Interrogatories and request for documents...."

(EX. 6)

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

BERMAN J. WATTS, JR.,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO.
	)	00-D-1260-S
LOUIS CALDERA, ET AL.,	)	
Defendants.	)	
	)	

ORDER

Upon consideration of the plaintiff's Motion for Leave to Amend and Supplement Complaint Out of Time, filed on 6 September 2000 (Doc. #34), and for good cause, it is

ORDERED that the motion is DENIED. The allegations in the September amendment add no new cognizable claims to this lawsuit.

DONE this 6th day of October, 2000.

(Signed)Vanzetta Penn McPherson
VANZETTA PENN MCPHERSON
UNITED STATES MAGISTRATE
JUDGE

(EX. 7)

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

BERMAN J. WATTS, JR., Plaintiff,	)	
vs.	)	CIVIL ACTION NO.
	)	00-D-1260-S
LOUIS CALDERA, ET AL., Defendants.	)	

ORDER

For good cause, it is

ORDERED that the plaintiff's Motion to Amend the Complaint, filed on 19 December 2001, is DENIED. The plaintiff's claims were dismissed with prejudice by order of this court on 6 December 2001 (Doc. #75).

DONE this 26th day of December, 2001.

(Signed)Vanzetta Penn Mcpherson
VANZETTA PENN MCPHERSON
UNITED STATES MAGISTRATE
JUDGE

(EX. 8)

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

BERMAN J. WATTS, JR.,)
Plaintiff,)
vs.) CIVIL ACTION NO.
) 00-D-1260-S
LOUIS CALDERA, ET AL.,)
Defendants.)
)

ORDER

For good cause, it is

ORDERED that the motion for appointment of Counsel is DENIED. The pleadings filed by plaintiff and his long record of litigating in this court establish that he is capable of presenting the necessary elements of his claims to this court. The plaintiff fails to show that there are exceptional circumstances justifying the appointment of counsel.***See Kilgo v. Ricks,*** 983 F.2d 189m193 (11th Cir. 1993); ***See also Fowler v. Jones,*** 899 F.2d 1088, 1096 (11th Cir.1990).

Done this 29th day of November, 2001.

(Signed)Vanzetta Penn Mcpherson
VANZETTA PENN MCPHERSON
UNITED STATES MAGISTRATE JUDGE

CONGRESS OF THE UNITED STATES
House of Representatives
Washington D.C. 20515-1005

February 7, 1995

Mr. B. J. Watts Jr.
2648 Brownsmill Rd.
Atlanta, GA 30354

Dear Mr. Watts:

Enclosed is a copy of the response from the Department of the Army regarding your concerns.

The letter states that the vacancy for an Aerospace Engineer (Flight Test Pilot) was advertised in three recruiting sources. When an error was discovered in the vacancy advertisement , a correction was issued. The letter further states that the application cut-off date was extended, to ensure that all candidates had an opportunity to see the correction.

I hope this information is useful to you. As always , I appreciate the opportunity to serve you.

With all good wishes,

Sincerely,

(Signed)
John Lewis
Member of Congress

(EX. 10)

DEPARTMENT OF THE ARMY
HEADQUARTERS UNITED STATES ARMY
AVIATION CENTER AND FT. RUCKER

January 26, 1996

Office of the Commanding General

Honorable John Lewis
House of Representatives
The Equitable Building
100 Peachtree Street, Northwest, Suite #1920
Atlanta, Georgia 30303

Dear Mr. Lewis:

This replies to your inquiry of December 12, 1995, on behalf of Mr. B. J. Watts regarding an Aerospace Engineering (Flight Test Pilot) position vacancy and his allegation of discriminatory hiring practices at Ft. Rucker.

There is only one vacancy for Aerospace Engineer (Flight Test Pilot) at Ft. Rucker, however due to the difficulty in filling the position, three recruiting sources were used. The three sources are Ft. Rucker's Job Opportunity Announcement, a Recruiting Bulletin, and the Office of Personnel Management (OPM) Automatic Bulletin Board. These sources permit the announcement to be made to available to more candidates. These announcements included the the requirement for the experience as a Flight Test Pilot in addition to experience as an Aerospace Engineer. There was an error in the educational requirements on the announcements. A correction was issued to the announcements , and the first cut-off date for applicants was extended for an additional week to ensure that all candidates had the opportunity to see the correction.

It appears that on the listing Mr. Watts submitted in his letter to you , possibly a private employment agency has

taken excerpts from the OPM announcement and issued it, but we are not aware of who it was or where it was announced. When Mr. Watts contacted out personnel office to inquire about the position, he was told that there was only one vacancy, and it did require the duties of a Flight Test Pilot.

Ft. Rucker treated all of the candidates equally and fairly without regard to their race. I hope this information will assist you in replying to Mr. Watts.

Sincerely,

(Signed).
Ronald E. Adams
Major General , U.S. Army
Commanding General

CONGRESS OF THE UNITED STATES
House of Representatives
Washington D.C. 20515-1005
March 29, 1995

Mr. B. J. Watts Jr.
2648 Brownsmill Rd.
Atlanta, GA 30354

Dear Mr. Watts:

Enclosed is a copy of the response from the Department of the Army regarding your concerns.

The letter states that job vacancy announcement P-43-95 is for the position of Aerospace Engineer (Flight Test Pilot). The Army is unable to fufill your request for a an announcement or application for the Aerospace Engineer position with no pilot duties , because the position announcement vacancy does not exist.

Although this is not a favorable response, it does explain the position of the Department of the Army. As always, I appreciate the opportunity to serve you.

With all good wishes,

Sincerely,
(Signed)
John Lewis
Member of Congress

JL:srs
Enclosure

DEPARTMENT OF THE ARMY
HEADQUARTERS UNITED STATES ARMY
AVIATION CENTER AND FT. RUCKER

March 21, 1996

Office of the Commanding General

Honorable John Lewis
House of Representatives
The Equitable Building
100 Peachtree Street, Northwest, Suite 1920
Atlanta, Georgia 30303

Dear Mr. Lewis:

This replies to your inquiry of March 5, 1996, on behalf of Mr. B. J. Watts regarding his rebuttal of my letter to you on January 26, 1996, concerning a job vacancy announcement.

Our records indicate that we had only one position , an Aerospace Engineer (Flight Test Pilot), GS-861-13. The announcement we used clearly stated that the position title was Aerospace Engineer (Flight Test Pilot). The vacancy was announced correctly using Ft. Rucker's official Job Opportunity Announcement, a Recruiting Bulletin, and the Office of Personnel Management (OPM) Bulletin Board. We used no other sources of recruitment, We cannot comply with Mr. Watts ' request for an application packet and announcement for an Aerospace Engineer position with no pilot duties since no such vacancy announcement exist. The announcement to which Mr. Watts refers, P-43-95, specifically sates that the title of the position is Aerospace Engineer (Flight Test Pilot).

Mr. Watts stated that he received his information about the Aerospace engineer position that did not require

flight test pilot duties from the Federal Career Opportunities This is a commercial publication over which we have no control. We neither solicited their inclusion of our job announcement nor did we approve it. As stated in my previous reply, private companies do pick up our announcements from the OPM Bulletin Board and include them in their publications. They do not always include all the requirements for the job , which in this case, made it appear to Mr. Watts that we had not announced the position correctly. If Mr. Watts would like to contact the Federal Career Opportunities publishers, their address is Federal Research Services, Incorporated, Post Office Box 1059, Vienna ,Virginia 22183-1059.

I hope this information will assist you in replying to Mr. Watts . I assure you that our hiring practices are well-defined and within established guidelines.

Sincerely,

(Signed)

Ronald E. Adams
Major General , U.S. Army
Commanding General

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

BERMAN J. WATTS, JR., Plaintiff,	)	
vs.	)	CIVIL ACTION NO.
	)	00-D-1260-S
LOUIS CALDERA, ET AL., Defendants.	)	

ORDER

Upon consideration of the defendant's motion To Strike the plaintiff's Amendment to Complaint and Additional Amendment to Complaint filed on 25 August 2000 (Doc. #29), and for good cause, it is

ORDERED that the motion is GRANTED. The plaintiff's amendment to complaint, filed on 9 August 2000 (Doc.#25) adds no new parties or causes of action to this lawsuit.

DONE fhis 6th day of October, 2000.

(Signed)
VANZETTA PENN MCPHERSON
UNITED STATES MAGISTRATE
JUDGE

(EX. 11)

No. 03-103

In the Supreme Court of the United States

BERMAN J. WATTS, JR., PETITIONER

v.

LES BROWNLEE, ACTING SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
MARLEIGH D. DOVER
AUGUST E. FLENTJE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner can, or has, properly raised a disparate impact claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*

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In the Supreme Court of the United States

No. 03-103

BERMAN J. WATTS, JR., PETITIONER

v.

LES BROWNLEE, ACTING SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unreported. The pertinent opinion of the district court (Pet. App. Exs. 3-4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 2002. The court of appeals denied the petition for rehearing on February 18, 2003 (Pet. App. 9a-10a). The petition for a writ of certiorari was filed on May 16, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case stems from petitioner's unsuccessful effort to obtain a job application for a non-pilot, engineering position at Fort Rucker in Alabama.

1. Petitioner requested a job application from the Fort Rucker Personnel Office for a non-pilot, aerospace engineer position. Pet. App. 2a. Petitioner, however, was sent an application for a position requiring a pilot's license, which petitioner did not have. *Ibid.* Petitioner contended that private publications listed an engineering position that did not require a pilot's license. *Id.* at 2a-3a. The government maintained that a non-pilot position never existed, and that the publication suggesting otherwise had made an error that was promptly corrected. See *id.* at 2a-3a; Pet. App. Ex. 10, at 2.[1]

Petitioner filed a formal administrative complaint alleging that respondents had discriminated based on race and had retaliated against him for having filed previous grievances. The complaint, however, did not allege age discrimination. See Pet. Ex. 4, at 4; see also Plaintiff's Additional Amendment and Clarification of Complaint, Ex. 12 (Aug. 17, 2000) (Dist. Ct. Docket Entry No. 50) (attaching copy of formal EEO complaint). On April 16, 1999, the Fort Rucker Equal Employment Opportunity Office determined that petitioner had presented no evidence to support a claim of race discrimination or retaliation. See Pet. App. 3a. Petitioner appealed to the Equal Employment Opportunity Commission (EEOC) and the Merit Systems Protection Board (MSPB). The EEOC also concluded that no discrimination or retaliation had been shown,

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[1] Some of the exhibits to the petition for a writ of certiorari are not separately numbered. For the Court's convenience, we have included page numbers when citing those materials.

and the MSPB dismissed petitioner's appeal. See *id.* at 3a-4a.

Petitioner then filed a complaint in district court. In that complaint, petitioner alleged race discrimination, retaliation, and, for the first time, discrimination based on age. Petitioner, however, did not pursue the age discrimination claim in his summary judgment papers. See Memorandum in Support of Plaintiff's Response to Defendant's Motion to Dismiss or for Summary Judgment (Dec. 12, 2000) (Dist. Ct. Docket Entry No. 54); Memorandum in Support of Plaintiff's Response to Defendant's Reply on Motion to Dismiss or for Summary Judgment (Jan. 12, 2001) (Dist. Ct. Docket Entry No. 56). A magistrate judge recommended granting summary judgment for the government. Pet. App. Ex. 4. The magistrate's report addressed petitioner's race discrimination and retaliation claims under Title VII. *Ibid.* It did not, however, address any age discrimination claims. *Ibid.* Adopting the report and recommendation of the magistrate judge, the district court granted the government's motion for summary judgment. Pet. App. Ex. 3.

2. Petitioner appealed, arguing that he had been subjected to race discrimination (including disparate impact discrimination) and retaliation, Pet. C.A. Br. 17-22; that venue was improper, *id.* at 24-25; that the district court had jurisdiction over his appeal of the MSBP decision, *id.* at 33-34; and that the district court had made various other procedural errors, *id.* at 27-31, 34-38. See Pet. C.A. Reply Br. 5-7. Petitioner did not, however, claim age discrimination. Petitioner's opening brief thus did not mention age discrimination at all, and his reply brief mentioned it only once, when citing an age discrimination case to support petitioner's claim that he was entitled to discovery. *Id.* at 14.

The court of appeals affirmed. Pet. App. 1a-8a. The court of appeals first found that petitioner had not established "a prima facie case of discrimination or retaliation." Pet. App. 5a. Petitioner, the court of appeals held, had "raised no genuine issue of material fact that another equally or less qualified person outside the protected class received a non-pilot application when [petitioner] made his request." *Id.* at 4a. Further, while petitioner claimed that he never received applications for non-pilot positions once such positions became available, petitioner "never requested applications for these positions." *Ibid.* Petitioner, moreover, "proffered no evidence that a similarly situated person outside the protected class received an application without asking for one." *Ibid.*

The court of appeals also dismissed petitioner's disparate impact claim in a footnote. The court noted that, under circuit precedent, petitioner's "disparate impact claim is cognizable only under Title VII." Pet. App. 6a n.3. The court then explained that petitioner's "disparate impact claim" under Title VII "fails because [petitioner] identifies no specific practice that resulted" in African-Americans not being hired as aerospace engineers. *Ibid.*

Finally, the court of appeals concluded that petitioner's retaliation claim was properly dismissed for failure to show adverse employment action. See Pet. App. 5a. No non-pilot position existed when petitioner applied, and petitioner did not apply for such a position when one did become available. *Ibid.* Petitioner, the court of appeals further observed, had failed to show that the Fort Rucker employee who sent the application had any knowledge of petitioner's protected activities. *Ibid.*

ARGUMENT

The court of appeals' unpublished decision, which holds that petitioner's discrimination claims were factually unsupported, is correct and does not warrant further review. Although petitioner asks this Court to decide whether a disparate impact claim may be brought under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, this case does not properly present that question. Petitioner failed to satisfy the statutory conditions precedent to filing a lawsuit under the ADEA, and he failed properly to press an age discrimination claim in either the district court or the court of appeals. The court of appeals, moreover, correctly concluded that petitioner had not demonstrated any adverse employment action, let alone made out a discrimination claim of any variety (disparate impact or otherwise). Petitioner did not merely fail to identify any "practice" producing a disparate impact. Petitioner also failed to produce any evidence to support the *sine qua non* of any private ADEA claim —proof that he was treated differently on account of his age. Because resolution of the question on which petitioner seeks review would not alter the judgment below, further review is unwarranted.

1. In an earlier decision, *Adams* v. *Florida Power Corp.*, 255 F.3d 1322, 1326 (2001), cert. dismissed, 535 U.S. 228 (2002),[2] the Eleventh Circuit concluded that the ADEA does not provide for disparate impact claims. The court of appeals in that case explained that the pertinent language of the ADEA is most closely related to that of the Equal Pay Act of 1963, *id.* at 1325,

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[2] This Court granted the petition for a writ of certiorari and heard oral argument in *Adams*, 534 U.S. 1054 (2001), but dismissed the writ as improvidently granted, 535 U.S. 228 (2002).

which this Court has interpreted as precluding disparate impact claims, see *ibid.* Furthermore, although this Court has explicitly left open whether disparate impact claims can be brought under the ADEA, in *Adams* the court of appeals read *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604 (1993), as suggesting that such claims cannot be brought under the ADEA. See 255 F.3d at 1326. In *Hazen Paper*, the Court noted that "[d]isparate *treatment* * * * captures the essence of what Congress sought to prohibit in the ADEA." 507 U.S. at 610 (emphasis added). In a concurrence, three Justices agreed that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA." *Id.* at 618 (Kennedy, J., concurring).

While some circuits continue to allow disparate impact claims under the ADEA, the trend since *Hazen Paper* has been away from allowing such claims. Relying on *Hazen Paper*, the First, Third, Sixth, Seventh, Tenth, and Eleventh Circuits have all concluded that disparate impact claims cannot be brought under the ADEA.[3] Second and Ninth Circuit decisions have reached the opposite result, but based "on pre-*Hazen* precedent." *Hyman* v. *First Union Corp.*, 980 F. Supp.

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[3] *Mullin* v. *Raytheon Co.*, 164 F.3d 696, 700-701 (1st Cir.) (not allowing disparate impact claim under ADEA), cert. denied, 528 U.S. 811 (1999); *Ellis* v. *United Airlines, Inc.*, 73 F.3d 999, 1006-1007 (10th Cir.) (same), cert. denied, 517 U.S. 1245 (1996); *DiBiase* v. *SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir.) (same), cert. denied, 516 U.S. 916 (1995); *Lyon* v. *Ohio Educ. Ass'n & Prof'l Staff Union*, 53 F.3d 135, 139 n.5 (6th Cir. 1995) (same); *EEOC* v. *Francis W. Parker Sch.*, 41 F.3d 1073, 1076-1077 (7th Cir. 1994) (same), cert. denied, 515 U.S. 1142 (1995); *Adams* v. *Florida Power Corp.*, 255 F.3d at 1326.

38 (D.D.C. 1997).[4] And the Eighth Circuit has questioned its pre-*Hazen* determination that the ADEA allows disparate impact claims. See *Allen* v. *Entergy Corp.*, 193 F.3d 1010, 1015 n.5 (8th Cir. 1999).

2. Notwithstanding the divergence of court of appeals authority, this case does not come close to presenting an appropriate vehicle for addressing whether disparate impact claims may be brought under the ADEA. There are at least three features of this case that make further review inappropriate.[5]

a. First, petitioner did not properly raise his ADEA claim through administrative review or in the courts below. The ADEA creates "two alternative routes for pursuing a claim of age discrimination." *Stevens* v. *Department of Treasury*, 500 U.S. 1, 5 (1991). "An individual may invoke the [Equal Employment Opportunity Commission's (EEOC's)] administrative process and then file a civil action in federal district court if he is not satisfied with his administrative remedies." *Stevens*, 500 U.S. at 5 (citing 29 U.S.C. 633a(b) and (c)). Alternatively, a claimant may bring an age claim in federal court directly if the claimant has notified the

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[4] See *Frank* v. *United Airlines, Inc.*, 216 F.3d 845, 856 (9th Cir. 2000) (allowing disparate impact claim under ADEA), cert. denied, 532 U.S. 914 (2001); *Lewis* v. *Aerospace Cmty. Credit Union*, 114 F.3d 745, 750 (8th Cir. 1997) (same), cert. denied, 523 U.S. 1062 (1998); *Criley* v. *Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997) (per curiam) (same).

[5] In addition, the division in circuit authority appears to focus on the provisions of the ADEA governing non-federal employment, 29 U.S.C. 623 *et seq.*, not the distinct provisions addressing age discrimination in federal employment at issue here, see 29 U.S.C. 633a. Accordingly, this case might not present a suitable vehicle for addressing the statutory language that was previously at issue in *Adams* (a case involving a non-federal employer) and that has resulted in a split in circuit authority.

EEOC within 180 days of the unlawful action. 29 U.S.C. 633a(d); *Stevens*, 500 U.S. at 6-7.

Here, petitioner followed neither route. Although petitioner filed a formal administrative complaint with the EEOC raising his claims of race discrimination and retaliation, he did not raise an age discrimination claim. Pet. Ex. 4, at 4; Plaintiff's Additional Amendment and Clarification of Complaint, Ex. 12 (Aug. 17, 2000) (Dist. Ct. Docket Entry No. 50) (attaching copy of formal EEO complaint). In fact, petitioner did not once use the term "age discrimination," or anything close to it, in the administrative complaint. Cf. *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 469 (2000) (issue raised when lower court was "fairly put on notice as to the substance of the issue") (citing *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. 153, 174-175 (1988)). And while petitioner initially attempted to raise an age claim directly in federal court by mentioning the ADEA in his complaint, he did not notify the EEOC of that claim within 180 days of the unlawful action. See *Stevens*, 500 U.S. at 6-7. Petitioner's failure to avail himself of any of the statutorily required procedures forecloses his claim.

Petitioner, moreover, did not press his age discrimination claim either in his district court summary judgment papers or on appeal. In fact, the only reference to age discrimination in petitioner's court of appeals briefs appears in petitioner's reply brief. There, petitioner cited an age discrimination case to support his argument that he was entitled to additional discovery to pursue his race discrimination claim. See Pet. C.A. Reply Br. 14 ("So simple a request [for limited discovery] is no bar to provision of such data in an Age discrimination case as we have cited above Dilla v. West[,] 4 F. Sup[p]. 2d 1130."). That statement does not sufficiently raise an age discrimination claim, much less a

disparate impact age discrimination claim. But even if it did, issues raised for the first time in reply are generally waived. See *United States* v. *Whitesell*, 314 F.3d 1251, 1256 (11th Cir. 2002) (declining to address issue raised for first time in reply brief); *United States* v. *Oakley*, 744 F.2d 1553, 1556 (11th Cir. 1984) ("Arguments raised for the first time in a reply brief are not properly before the reviewing court.") (citation omitted). Therefore, even if one were to overlook petitioner's defaults before the EEOC and the district court, petitioner forfeited the claim before the court of appeals as well.

b. Notwithstanding those omissions, the court of appeals' unpublished decision mentioned (and dismissed) petitioners' age discrimination disparate impact claim in passing in a two-sentence footnote. Pet. App. 6a n.3. The court first stated that the "disparate impact claim is cognizable only under Title VII," citing *Adams* v. *Florida Power Corp.*, *supra*. The court of appeals then stated that petitioners' "disparate impact claim" under Title VII "fails because [petitioner] identifies no specific practice that resulted in no African-Americans being hired as aerospace engineers." Pet. App. 6a n.3.

For the same reason, petitioner's disparate impact claim under the ADEA must fail, even assuming such claims can be asserted. In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), this Court recognized the possibility of disparate impact claims in Title VII cases. Under a disparate impact theory, "facially neutral employment *practices* that have significant adverse effects on protected" groups may "violate the Act without proof that the employer adopted those practices with a discriminatory intent." *Watson* v. *Fort Worth Bank & Trust*, 487

U.S. 977, 986-987 (1988) (emphasis added).[6] Consequently, a plaintiff asserting such a claim must identify the specific employment practice that he is challenging. See *id.* at 994 (plurality opinion) ("[T]he plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."). In addition, the plaintiff must prove causation, *i.e.*, "the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Ibid.* These statistical disparities must be "sufficiently substantial." See *id.* at 995 (plurality opinion). Only once those showings are made must the employer show that "the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. 2000e-2(k).

Here, petitioner failed to establish a prima facie disparate impact claim. Petitioner can point to no "employment practice" that has had the effect of discriminating against people on the basis of age. Cf. Pet. App. 6a n.3 ("Watts identifies no specific *practice* that resulted in no African-Americans being hired as aerospace engineers.") (emphasis added). Nor has petitioner provided any relevant statistical evidence. To the contrary, petitioner's claim consisted of a single instance in which he claimed to have received the wrong application for employment. See Pet. App. 2a. But "[t]he evidence in these 'disparate impact' cases usually

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[6] Although *Griggs* and its progeny yielded a three-part test for Title VII disparate impact claims, *Connecticut* v. *Teal*, 457 U.S. 440, 446 (1982), Congress established a statutory standard in 1991. See 42 U.S.C. 2000e-2(k).

focuses on statistical disparities, *rather than specific incidents*, and on competing explanations for those disparities." *Watson*, 487 U.S. at 987 (emphasis added).

c. Finally, and most fundamentally, the court of appeals' decision squarely forecloses petitioner's disparate impact claim—or any other sort of discrimination claim —by holding that petitioner failed to demonstrate that *he* was treated differently or otherwise injured as a result of intentional discrimination or a practice with discriminatory impact. In particular, the court of appeals found that petitioner had not established "a prima facie case of discrimination or retaliation," because petitioner "raised no genuine issue of material fact" regarding differential treatment. Pet. App. 4a. Thus, while petitioner claims that the agency failed to provide him with a non-pilot aerospace engineer application on request, there was "no evidence that someone else was provided a non-pilot engineer application when [petitioner] was denied one." *Ibid.* The bottom line is that petitioner was not given an application for that position because no such position then existed.[7] Nor was petitioner treated differently when the agency failed to send petitioner such an application *sua sponte* once a non-pilot aeronautical engineering position did become available. Petitioner "proffered no evidence that a similarly situated person outside the protected class received an application without asking for one." *Ibid.*

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[7] Petitioner's apparent belief that such a position did exist arises from the fact that a private company reproduced the original announcement of an available position with an error in the educational requirements. See Pet. App. Ex. 10, at 2. That was quickly corrected by the Army, and the announcement was reissued with an extension "to ensure that all candidates had the opportunity to see the correction." *Ibid.*

That conclusion—that petitioner produced no evidence that he was treated differently or otherwise injured on account of his age—independently supports the judgment below, whether or not the ADEA permits disparate impact claims. A plaintiff cannot bring a discrimination claim under the ADEA unless the *plaintiff himself* was somehow treated differently than others (or differently than he otherwise would have been treated) by reason of age. See 29 U.S.C. 626(c)(1), 633a(c) (claimant must be "aggrieved"). Because the court of appeals and district court both found such proof absent in this case, the court of appeals' judgment affirming the grant of summary judgment must stand, whether or not disparate impact claims are cognizable under the ADEA. Where, as here, resolution of the question presented could not alter the judgment below, further review is inappropriate. This Court "reviews judgments, not statements in opinions," *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956), and the Court does not ordinarily "decide questions that cannot affect the rights of litigants in the case before" it, *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990).[8]

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[8] Petitioner does allege that the court of appeals erred in concluding that he had failed to make out a prima facie case of discrimination. See Pet. 15-26. The court of appeals' fact-bound ruling on that issue, however, does not warrant further review. Furthermore, petitioner (in essence) asserts that he was entitled to avoid summary judgment without any proof of discrimination and despite the government's proof of consistent rather than discriminatory conduct. No principle of law entitles petitioner to that result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
PETER D. KEISLER
Assistant Attorney General
MARLEIGH D. DOVER
AUGUST E. FLENTJE
Attorneys

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No. 03 - 103

IN THE

SUPREME COURT OF THE UNITED STATES

BERMAN J. WATTS JR.,

Petitioner,
vs.

LES BROWNLEE, ACTING SECRETARY of the ARMY; DEPARTMENT OF THE ARMY, Headquarters United States Army Aviation Center and Ft. Rucker,
Respondent.

PETITIONER'S REPLY BRIEF TO FEDERAL RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Berman J. Watts, Jr.
P.O. Box 82202
Atlanta, Georgia
30354
(404) 622-3195

Petitioner Pro Se

HPP

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Berman J. Watts, Jr.
P.O. Box 82202
Atlanta, Georgia
30354
(404) 622-3195

Petitioner Pro Se

QUESTIONS PRESENTED

I. Whether employment discrimination involving age includes disparate impact and, proof of disparate treatment as in Title VII race and other employment discrimination?

II. Whether demonstration of a prima facie case of hiring employment discrimination by the *McDonnell Douglass* framework for discrimination may be limited to the form for post hiring disparate treatment when the hiring framework otherwise demonstrates such discrimination but the post hiring form can be construed not to.

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OPINIONS BELOW

The Eleventh Circuit's opinion has not been reported (Pet.App. 1a-8a). The applicable District court opinion is also unreported (Pet. App. Exs.3-4).

JURISDICTION

On appeal, invoking Title 28 §§1291,1292 jurisdiction, the Eleventh Circuit issued an order dismissing the appeal on November 12 , 2003. Timely Petition for Rehearing and Suggestion for Rehearing en banc were filed and, subsequently denied on February18, 2003.

The jurisdiction of this court to review the lower court was invoked under 28 U.S.C. §1254 (1).

STATEMENT

This case results from the Eleventh Circuit Court of Appeals affirmation of a district court adoption of a Magistrates Report and Recommendation for a summary judgment order in an employment discrimination case based on race, retaliation and age. Although other aerospace engineer jobs advertised nationally as not requiring "helicopter pilot in command" experience were listed, Defendant Respondent Army (Ft. Rucker Army Aviation Center/ Test Organizations and Directorate of Combat Developments), provided announcement and application for, and claimed only a job requiring "helicopter pilot in

command" experience existed upon request. Subsequent inquiry via Petitioner's Congressional Representative resulted in the Army's reiteration of such claim in writing although concurrently other such positions were being advertised in media not yet then cited and, subsequently roughly a dozen such positions were filled not requiring such "helicopter pilot in command " experience. "Official" listings were after the fact assertion(s) involving the single helicopter pilot experience requirement aerospace engineer's job by the personnel officer and his successor (who was not present at such time) rather than the documentation required by respondent's own regulations for the register of jobs at such period- despite repeated discovery requests and motion to compel discovery prior to summary judgment. Respondent also contradicted itself in justifying the automatic distribution of application for subsequent such jobs as not being provided ever and subsequently as being provided on request. (Summary Judgment Motion response to Opposition, . R2-55-15,.)

Action was brought in the initial district court pursuant to Title VII of the Act of Congress known as " The Civil Rights Act of 1964" as amended, for employment discrimination and retaliation. Judicial review of the involved Merit Systems Protection Board procedures was requested pursuant to Title 5 U.S.C. § 7702, 7703. Additional bases of action include 29 U.S.C.§ 626(c),633a(c) and 29 U.S.C. § 216(b).

Argument

Not withstanding Respondent's admission of " the "divergence of the court of appeals authority", the appropriateness of this case as a vehicle for addressing whether disparate impact claims may be brought under the ADEA is subjected to a three pronged attack.

a. First the raising of the ADEA claim administratively and in the courts below is described as improper. The ADEA is described as creating" two alternative routes for pursuing a claim of age " discrimination. Invoking the Equal Employment Opportunity Commission's administrative process with subsequent resort to the federal courts upon unsatisfactory EEOC performance as to effective remedy is described as one means. The alternative is described as directly bringing a claim in federal court as long as the EEOC has been notified within 180 days of the illegal action. Respondent's position is that petitioner followed neither route "properly."

However petitioner filed administratively via the EEO system for the involved and continuing discrimination. Multiple appeals to and, review by the EEOC were made of such internal administrative process in an effort to exhaust administrative remedy. See Petitioner's initial Petition for Certiorari at APP. EX.4 pages 3-5 of 21 (Administrative and Procedural History section of the Magistrates Recommendation and Report).

" Watts appealed this decision to the EEOC OFO and to the Merit Systems Protection Board ["MSPB"]. On 31 March 2000, the EEOC OFO issued a written decision upholding the Army's finding of no retaliation and no discrimination (Doc. #50, exh. 18). "

Action in the federal courts was initiated on April 14,

2000.(Petitioner's initial Petition for Certiorari at APP. EX.4 pages 5-6 of 21- Judicial Procedural History section Of Magistrates Report and Recommendation). Thus judicial complaint was made within 14 days of the EEOC's last action and the EEOC had been previously notified by prior administrative appeal(s) of final agency decisions at the times such agency indicated via written notice that appeal to the EEOC was the next step.

Discrimination charge adequacy has been established. "Essentially notice of the alleged act it's date and context will suffice" *EEOC v. Shell Oil Co.* ,466 U.S.54, S. Ct. 1621, 80 LED 2d 41.Petitioner's charge and later age discrimination complaint was integral to the other statutory bases of retaliation and race as he was a member of the protected group(s) defined by age also. Thus such basis is integral and included in the summary judgment and appeal as the Eleventh Circuit recognized by it's response. Indeed , respondent defendants waived defense of such basis of complaint (age) and essentially admitted the charges on such basis.

Fed. Rule of Civ. P. 12 (h) (1)states:

"A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in paragraph (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereto permitted by rule 15(a) to be made as a matter of course."

In neither federal district court did respondent make such motions and/or responsive pleadings include the defenses here raised for the first time in opposition to petition for certiorari.

b. The appeals court recognized the basis of complaint(age) and expressly stated that " the disparate impact claim is cognizable only under Title VII," citing *Adams v.Florida Power Corp.* However that court stated that Petitioner's "disparate impact claim" fails because"[petitioner] identifies "no specific practice" that resulted in a disparate result. But the very actions respondent used to justify it's non-consideration for hiring of petitioner functioned as such specific practices. That was the provision of applications and announcements for jobs other than those applied for or that one was known to be qualified for (in this case – pilot in command experience of a helicopter for an aerospace engineer job), continuing denial of the existence of an aerospace engineer job without helicopter pilot in command experience existence even upon congressional inquiry as nearly a dozen such jobs were filled with those not of the protected group(s). Moreover the entire decision process (recruitment and hiring) itself can be considered a specific practice where it can be demonstrated (42 U.S.C. § 2000e-2(k)(1)(A)(i)) that the elements of a respondent's decision making process are not capable of separation for analysis (42 U.S.C. § 2000e-2(k)(1)(B)(i). The decision making process elements here too conveniently appear after the event and upon lawsuit so as to justify actions taken, and are arbitrary. "In particular they are: the claim that no notice of such positions was made unless specifically requested (self- contradicted depending on response currently considered most effective as defense between initial and subsequent Summary judgment opposition responses); the overall operation of the civilian employment recruitment office at Ft. Rucker (Subsequently moved to Ft. Benning and now Redstone Arsenal); provision of improper applications or announcements in contradiction with published notices as this case exemplifies and; continuation of such claims despite repeated requests"- even from petitioner's congressional representative. Petitioners Brief, page 26, APP. EX. 10 Pages 1-6.

Statistical evidence was submitted.(FOIA requests). Demonstrating not one member of the protected class was hired for years while roughly a dozen others were. There can hardly be a greater disparate impact than total exclusion, even absent "statistics", especially where the EEO census of employment (professional) establishes that there are thousands of protected group aerospace engineer degree holders. Even the probability of one known such individual being thus excluded is remote- especially given the disparity in comparative qualification of those typically hired which results in aircraft that are notorious for not being useable as designed and intended (See:Extensive data on the problems of the AH64 in the media-a Fort Rucker Army Aviation tested and "developed"system). Exact statistical methods (which, assisted by increasingly available cheap processing power, give exact probabilities rather than traditional estimates of error) allow the precise determination of the probability of such an outcome as the thesis cited by petitioner to the Appeals court demonstrates. Commercially available exact statistical programs are evaluated in the August 2002, and 2003 issues of American Statistician.

Additional statistical evidence involved the correlation of peaks in disparity (a multiple of the white) of accidental deaths for minorities at the start and end of a prior consent decree resulting from a employment discrimination class action (*Matthews - Hunttington)* 1979/80-86. The relatively recent death of an NAACP official occurred near such region while he was being escorted in excess of the speed limit by government (state) enforcement personnel in a vehicle (Ford SUV) that has been challenged as to it's rollover stability and upon a tire brand (Firestone) involved in an abnormal number of such accidents.

So notorious are the discriminatory activities in such area that academic statistical studies, employing judicial statistical criteria and demonstrating the prevalence of discrimination in such area, are a matter of published record .See: Intentional Job

Discrimination in Metropolitan Areas; Alabama 1999:Blumrosen and Blumrosen. The following URL (internet address) should provide access to a downloadable PDF file of the study or did as of 10/01/03:

http://www.rci.rutgers.edu/~nwklaw/blumrosen/AL1999.pdf

Even the federal district (Middle District of Alabama) which respondent so avidly sought by a successful change of venue effort demonstrates a statistical bias with regards to discrimination suit outcomes. Using the then available Cornell database of federal district court outcomes and, the parameters employment, federal defendant, race, discrimination and plaintiff win rate : Plaintiff win rate was about .06 or 6 out of 100 compared to far greater rates for other districts across the nation- especially where certain minorities are less represented. Such divergence of district and corresponding appellate judicial result is directly affected by the second issue raised as cause for granting the writ: "whether a prima facie case demonstration of failure to hire (or other mode of discrimination) may be arbitrarily limited to a post hiring (or other) model to avoid the demonstration of a prima facie case".

c. Integral to the ADEA disparate impact claim are the means by which the proof of the prima facie case of discrimination and retaliation was denied. To get to the disparate impact issue the second question – whether a prima facie case demonstration of failure to hire may be arbitrarily limited to a post hiring model to avoid a demonstration of a prima facie case- requires a resolution favorable to petitioner. Thus are eliminated those factors which the respondent references as "fact bound " with regards to this court and the primary question.

Although this matter involves hiring, the model invoked by the federal district court for determining the existence of a prima facie case uses that developed for post hiring different treatment.

The fundamental difference is that the pre- hiring demonstration requires only that one apply, be qualified , be denied and that the employer keep seeking applicants of similar qualification. *McDonnell Douglas,* 411 U.S. at 802, 93 sect. at 1824. Whereas the post hiring demonstration requires a demonstration that someone else, whose identity and treatment is wholly in the hands of an employer who adamantly refused any discovery prior to summary judgment , was treated more favorably. That is: provided proper application. Since some dozen or so others were admittedly subsequently hired it would seem that they did receive the proper applications.

Such result- the heart of the prima facie demonstration of refusal to hire- is repeatedly achieved by various means by respondent with respect to petitioner. The district court denied supplemental and amended complaint for later applications that demonstrates continuing such effort and respondent's commitment to lack of equitable treatment in the employment process. Respondent arbitrarily held that automatic provision of applications for subsequent such jobs were only provided upon request and, when it suited their purposes that they were never provided. (summary judgment opposition responses last at R2-55-15) .

Even when their initial evasions were made transparent, respondents blithely created new ones even upon congressional inquiry.(Petitioner's APP. EX. 10 pages 1-6) Clearly the initial provision of the wrong application was continued by failure to provide application for jobs subsequently being offered at the time of such correspondence.

By claiming the clerk answering the "initial" request for the announcement and application was unaware of petitioner's prior protected activity or other factors, respondent ignores such correspondence. But such individual's superiors all admit knowledge of such factors and such clerk is subject to their

orders and hardly an authorized agent of the organization. *Goldsmith v. City of Atmore 996. F.2d 1155, 1162.* Clearly respondent was aware of petitioners prior protected activities and other factors in consideration of prior litigation.

CONCLUSION

For the foregoing reasons, petition for certiorari should be granted. The decision by the involved panel should be reversed. The actual issues raised on appeal should be given full hearing and the underlying decision reversed so that the requested relief is granted.

Respectfully submitted,

_____

Petitioner,
(Plaintiff)
P.O. Box 82202
Atlanta, GA 30354
404-622-3195